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IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7448

AROLD H. RIPPERGER,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (ROSZEL C. THOMSEN, Chief Judge)

BRIEF AND APPENDIX FOR APPELLANT

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The Daily Record Co., Baltimore 1, Md.

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from the verdict of guilty against Arold H. Ripperger under both counts of a two count Information, charging Defendant with willful failure to file income tax return for the calendar year 1953, in violation of Section 145(a), Internal Revenue Code of 1939; and with willful failure to file income tax return for the calendar year 1954 in violation of Section 7203, Internal Revenue Code of 1954. The criminal acts charged in the Information were the receipt by defendant in 1953 of a gross income in the amount of $7,523.69, and the receipt by the defendant in 1954 of a gross income in the amount of $8,051.96, and his willful failure to file income tax returns for said years. No specific act of willfulness, fraudulent conduct, tax eva-

sion, evil intent, or bad motive was proved by the government, nor were acts disclosing such bad purposes even mentioned in the brief testimony of the government's witnesses, unless the mere failure to file returns is in itself, with nothing more, considered as "evidence" sufficient to prove willfulness.

In commenting upon the facts in the case which showed "that it is not one of the more serious cases," the Court noted "that this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

Defendant pleaded "Not Guilty" and waived trial by jury, whereupon the case was tried before the Court.

Defendant was convicted under both counts of the Information and sentenced to three months on each of the 1st and 2d counts of the Criminal Information, said terms of imprisonment to run concurrently.

QUESTIONS INVOLVED

I.

In rewriting the Internal Revenue Code which culminated in the Internal Revenue Code of 1954, Congress brought together in Chapter 75 thereof all criminal offenses which had theretofore been scattered throughout many chapters and sections of the tax laws.

In commenting upon this phase of the Internal Revenue Code revision, the Senate Finance Committee Report states as follows:

> "In this Chapter all criminal offenses are brought together, as are all other offenses. . . .
>
> "In general, uniform penalties are provided by the House bill instead of the varying penalties now provided for *what in substance is the same offense, namely, the attempt to evade tax.* . . ." (Italics supplied) (Re-

port of the Committee on Finance United States Senate, 83rd Congress, Second Session, Report No. 1622, page 147.)

QUESTION: Since the government did not meet its burden of proving an affirmative willful attempt to evade tax on the part of defendant, did the District Court err in finding defendant guilty of willful failure to file tax returns for the years 1953 and 1954?

II.

Where a statute denounces as criminal a willful failure to perform a duty to the government, the government, in prosecuting a defendant under such statute, should affirmatively offer specific proof of an evil intent or bad purpose in order to prove willfulness on the part of the defendant in connection with his failure to perform such duty.

QUESTION: Did the District Court err in finding defendant guilty of willful failure to file tax returns for the years 1953 and 1954 in the absence of specific proof of an evil intent or bad purpose on the part of defendant in connection with his failure to file such returns?

III.

Did the District Court err in not granting defendant's request for a directed verdict?

STATUTES INVOLVED

Sec. 145(a) (1939 Internal Revenue Code):

"Failure to file returns, submit information, or pay estimated tax or tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such in-

formation, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the cost of prosecution."

Sec. 145(b) (1939 Internal Revenue Code):

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 3401(e):

"NUMBER OF WITHHOLDING EXEMPTIONS CLAIMED. — For purposes of this chapter, the term 'number of withholding exemptions claimed' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero."

Sec. 3402(a) INCOME TAX COLLECTED AT SOURCE:

"REQUIREMENT OF WITHHOLDING. — Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1)."

Sec. 3402(f):

"WITHHOLDING EXEMPTIONS.—

"(1) IN GENERAL — An employee receiving wages shall on any day be entitled to the following withholding exemptions:

"(A) an exemption for himself;

"(B) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(c)(1) (relating to old age) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(C) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(d)(1) (relating to the blind) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(D) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A), (B), or (C), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption; and

"(E) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit."

Sec. 3403. LIABILITY FOR TAX:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment."

Sec. 6011(b):

"IDENTIFICATION OF TAXPAYER. — The Secretary or his delegate is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons."

Sec. 6051(a):

"REQUIREMENT. — Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of the remuneration paid by such person to such employee during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, on the day on which the last payment of remuneration is made, a written statement showing the following:

(1) the name of such person,

(2) the name of the employee (and his social security account number if wages as defined in section 3121(a) have been paid,

(3) the total amount of wages as defined in section 3401(a);

(4) the total amount deducted and withheld as tax under section 3402,

(5) the total amount of wages as defined in section 3121(a), and

(6) the total amount deducted and withheld as tax under section 3101.

In the case of compensation paid for service as a member of a uniformed service, the statement shall show,

in lieu of the amount required to be shown by paragraph (5), the total amount of wages as defined in section 3121(a), computed in accordance with such section and section 3121(f)(2)."

Sec. 6051(c):

"ADDITIONAL REQUIREMENTS. — The statements required to be furnished pursuant to this section in respect of any remuneration shall be furnished at such other times, shall contain such other information, and shall be in such form as the Secretary or his delegate may by regulations prescribe."

Sec. 6051(d):

"STATEMENTS TO CONSTITUTE INFORMATION RETURNS. — A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary or his delegate shall, when required by such regulations, be filed with the Secretary or his delegate."

Sec. 6161(b):

"AMOUNT DETERMINED AS DEFICIENCY. — Under regulations prescribed by the Secretary or his delegate, the Secretary or his delegate may extend, to the extent provided below, the time for payment of the amount determined as a deficiency:

(1) In the case of a tax imposed by chapter 1 or 12, for a period not to exceed 18 months from the date fixed for payment of the deficiency, and, in exceptional cases, for a further period not to exceed 12 months.

(2) In the case of a tax imposed by chapter 11, for a period not to exceed 4 years from the date otherwise fixed for payment of the deficiency.

An extension under this subsection may be granted only where it is shown to the satisfaction of the Secretary or his delegate that the payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer in the case of a tax imposed by chapter 1, to the estate in the case of a

tax imposed by chapter 11, or to the donor in the case of a tax imposed by chapter 12. No extension shall be granted if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax."

Sec. 6201(a) ASSESSMENT AUTHORITY.

"AUTHORITY OF SECRETARY OR DELEGATE. — The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

"(1) TAXES SHOWN ON RETURN. — The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Sec. 6204(a):

"GENERAL RULE. — The Secretary or his delegate may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

Sec. 6513(b):

"PREPAID INCOME TAX. — For purposes of section 6511 or 6512, any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31. For purposes of section 6511 or 6512, any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under sec-

tion 6012 for such taxable year (determined without regard to any extension of time for filing such return)."

Sec. 6651(a):

"ADDITION TO THE TAX. — In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

Sec. 6653(a):

"NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES AND REGULATIONS WITH RESPECT TO INCOME OR GIFT TAXES. — If any part of any underpayment (as defined in subsection (c)(1) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

Sec. 6653(b):

"FRAUD. — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a)."

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

GENERAL STATEMENT AND BUREAU PROCEDURE NEGATIVING WILLFULNESS

In a prosecution for willful failure to file income tax returns, one would expect to find evidence of rather sinister conduct, or evil motives on the part of the defendant. Such conduct or motive, it would seem, should disclose some attempt by the defendant amounting to evasion of taxes; or at least some attempt to conceal, or conduct specifically proving the existence of an evil motive on the part of defendant to conceal his taxable status from the Director of Internal Revenue.

Such evidence does not exist in this case

On the contrary, defendant caused an income return to be filed for each year involved herein when he requested the filing of W-2's by his part-time employers.[1] Accord-

[1] I.T. 3820 (1946) "The Withholding Statement (Form W-2), relating to wages paid and income tax withheld, is an income return within the meaning of section 55(f)(1) of the Internal Revenue Code, and that section of the Code would apply if a copy of the statement were to be furnished to any person other than the individual employee concerned.

Advice is requested whether copies of the Withholding Statement (Form W-2), relating to wages paid and income tax withheld, may properly be furnished by an employer to a municipal agency.

Section 55(f)(1) of the Internal Revenue Code provides in part that it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return. Section 29.55(b)-1 of Regulations 111 provides that any properly authorized official body, or commission, lawfully charged with the administration of any State tax law, or properly designated representatives of such official, body, or commission, may, in the discretion of the Commissioner, inspect income returns for the purpose of such administration. Section 29.55(b)-1 of Regulations 111 also provides that for the purposes of that section the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of income returns.

The Withholding Statement (Form W-2) is furnished by employers to employees in accordance with section 1625(a) of the Internal Revenue Code. Section 1625(b) of the Code provides in part that a duplicate of such statement if made and filed in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary, shall constitute the return required to be made in respect of employees' wages under section 147 of the Code, which relates to returns of information as to payments of $500 or more.

It is held, therefore, that Withholding Statement (Form W-2) is an income return within the meaning of section 55(f)(1) of the Code, and that section of the Code would apply if a copy of the statement were to be furnished to any person other than the individual employee concerned. Accordingly, copies of the Withholding Statement (Form W-2) may not properly be furnished by an employer to a municipal agency.

Any person who is entitled, under section 55 of the Code and the regulations issued thereunder, to information included in a Withholding Statement (Form W-2) may procure it by proper application to the Bureau of Internal Revenue. Cf. I.T. 3677, C.B. 1944, 174, relative to the Employee's Withholding Exemption Certificate (Form W-4)."

ingly, the government was aware of defendant's taxable status, inasmuch as a Form W-2 is an official document in the office of the District Director.

Similarly, defendant was aware that the filing of a W-2 and the withholding and payment to the District Director of tax from his wages caused an account to be set up in his name in the District Director's office in Baltimore. This account remained an open account pending the receipt of his final returns by the District Director (App. 16, 28).

Bureau Procedure

It is imperative to a thorough consideration of the issue of willfulness involved herein that a full understanding of the appropriate procedures within the District Director's office be kept in mind. At the risk of being tedious we set forth below, in considerable detail, the way the withholding system works. The very nature of the system answers many of the questions which will arise in the minds of the Court about this case, and dispels any doubts the court may have as to defendant's fraud or concealment, or evil motive which is the crucial issue in the case. The government now has a system of withholding taxes (I.R.C. Sec. 3402(a)). This system functions substantially as follows.

An employee subject to withholding (which defendant was) files with his employer an exemption certificate (I.R.C. Sec. 3401(e); 3402(f)) on which the employee claims the number of exemptions, or a lesser number if he chooses, to which he is entitled. The employee is entitled to a $600 exemption for each dependent he claims and withholding of tax is made by the employer on the employee's wages in excess of his claimed exemptions.

(In the present case defendant was entitled to 4 exemptions — himself and three children. This would total $2400 of exemptions, and if defendant claimed all of his allowable exemptions, his employers could have paid him $2400

in wages before any tax would have been withheld. It would appear that defendant claimed only one, or none of his exemptions. This is the only inference that can be drawn from the amount of tax withheld from the wages shown on his W-2's (Def. Exh. No. 1, App. 47). If defendant had claimed all of his exemptions, no tax would have been withheld from his wages.)

The tax withheld by employer is forwarded quarterly to his District Director of Internal Revenue together with the names of the employees and their respective amount of taxes withheld. In determining as of what date the tax is paid, when it is paid by withholding, the Internal Revenue Code states that the payment of withholding tax at the source "shall, *in respect of the recipient of the income, be deemed to have been paid by him* on the 15th day of the fourth month following the close of his taxable year. . . ." (I.R.C. Sec. 6513(b) relating to claim for refunds, etc.) (Italics supplied.) At the end of the year the employer completes W-2's of which one copy is forwarded to the District Director of Internal Revenue; two copies to employee, and one copy is retained by employer (I.R.C. Sec. 3403; 6011(b); 6051(a)(c)(d)).

The government requires such information on W-2's "as is necessary or helpful in securing proper identification of such persons" (I.R.C. Sec. 6011(b)).

The District Director receives the money sent by employer and credits the tax to the account of the respective taxpayer for whom it was paid.

Knowledge by this Court of the procedure followed in the District Director's office subsequent to the receipt by him of W-2's is vital, as follows:

Upon receipt of W-2's, the District Director holds them for disposition in one of the three following ways:

1. When taxpayers file their final return for the year, the District Director associates the W-2's he has

with the tax returns filed by the respective taxpayers and the bulk of the W-2's in the District Director's office are disposed of in that manner.

2. Some taxpayers, because of the small size and nature of their income, are entitled to file a special form (1040A) without computing the tax. The District Director then computes the tax due by such taxpayer and either sends the taxpayer a bill for the additional amount due if the amount withheld is insufficient; or sends a refund in the event of an overpayment through withholding. In this manner another large number of W-2's in the possession of the District Director's office are disposed of by associating them with the 1040A's sent in by taxpayers described in this paragraph 2.

3. After the procedure outlined in paragraphs 1 and 2 above are completed, the District Director usually has a number of W-2's left which have not been associated or matched up with the final return of the respective taxpayer for the reason that the final return has not been filed. These unmatched W-2's would constitute the list of delinquent returns of which the District Director has official notice. In addition to the unmatched W-2's held by the District Director, he also has an open account standing in the name of the respective taxpayers for the amount of tax appearing on the W-2 as having been withheld and paid over to the District Director by the employer.

Defendant was aware of the existence of his open account in the office of the District Director (App. 16, 28). He knew that the filing of a W-2 by his employer put the District Director on notice that he was in a taxable status; and in at least two instances, defendant's employers would not have filed W-2's for him, and withheld tax from his wages if defendant had not insisted that they do (App. 13, 14, 15).

The District Director first communicated with defendant about his delinquent returns on November 14, 1955 (Exh. 2A). In passing, it is appropriate to make a few observations about this Exhibit. The address to which the letter was directed was the same address appearing on defendant's W-2 filed for 1952 indicating that the District Director was making his long overdue inquiry as to defendant's delinquent returns. Secondly, although the letter of November 14, 1955 was the first communication from the District Director's office about defendant's delinquent returns, defendant was instructed to reply to 327 Calvert Building—the address of the Intelligence Division which is charged with the investigation of alleged criminal violations. Obviously, the filing of a W-2 contained sufficient information "as is necessary or helpful in securing proper identification of such person" (I.R.C. Sec. 6011(b)).

STATEMENT OF FACTS

There is no dispute as to the facts. The defendant was born in Baltimore thirty-seven years ago. He was married on January 1, 1940, in the Mount Vernon Methodist Episcopal Church, and has three daughters, aged 14, 12, and 5. He attended the public schools in Baltimore and was graduated in 1937 from the Baltimore City College. He studied law at night at the University of Baltimore Law School, from which he was graduated in June 1940. He is a member of the Bar of the State of Maryland, the Baltimore City and Baltimore County Bars. He was employed from September, 1939 until August, 1942 as an Assistant Underwriter in the Public Liability Department at the Maryland Casualty Company. He was then employed for a short time by the Western Electric Company, Point Breeze, and in 1942 was employed as an Investigator in the Rent Control Section of the Office of Price Administration, Baltimore, Maryland. He remained with the Office of Price Administration

until February 1944, when he went with the law firm of Rome, Rome and Hamburger. He was with that firm until July, 1944, at which time he was inducted in the United States Navy. He served in the Navy until February 22, 1946, when he was honorably discharged. While in the Navy he received instruction as Chaplain's Assistant and served as such in Japan. He returned to the practice of law in Baltimore in 1946 and has continued in such occupation to the present time. He has had part-time employment and W-2's (Withholding Tax Statements) were filed with the Director of Internal Revenue at Baltimore for 1952, 1953 and 1954 as follows:

> *For the year 1952* by Eastern Woodworks, Inc., showing earnings of $800.00 and a tax withheld of $164.00.
>
> *For the year 1953* by St. Thomas Church, showing earnings of $800.00 and no tax withheld
>
> *For the same year, that is, 1953* by the Church of the Incarnation, showing that the defendant had earned $666.68 and that a tax was withheld in the amount of $88.40.
>
> *For the year 1954* by the Church of the Incarnation, showing the defendant had earned $1,500.03 and a tax withheld of $179.10.

The lack of funds together with his reliance upon the government's instruction sheet stating that the balance of tax due "must be paid with your return" (App. 25, 27; Def's. Exh. 6) was defendant's reason for not filing (App. 25). He intended to pay when he accumulated the money (App. 26). Throughout the period of non-filing, however, defendant knew that he had disclosed his taxable status to the District Director by his payment of withholding tax and the filing of W-2's (App. 13, 15, 16, 28).

The defendant's law practice was, and still is, an insubstantial one. He had to overcome the handicap of losing four years from practice while in the service — four important years to a young lawyer who is trying to gain a foothold in his profession.

The defendant's bank statements reveal he was always hard pressed financially.

The defendant gave a question and answer statement on November 18, 1955 to the Intelligence Division, Internal Revenue Service, Baltimore, Maryland. It is emphasized that the statement of November 18, 1955 was given spontaneously by the defendant, without any forewarning, preparation, opportunity to consult records, or counsel. Owing to the lack of opportunity to consult his records, it is conceded by the government that he made some inaccurate statements that were detrimental to him. For example, in answer to the agent's questions, which the agent must have considered important, the defendant stated that W-2's were not filed for him while he was employed at St. Thomas Church. Actually, they were filed for him by that church and were in fact filed for him during all the years he failed to file returns. It is significant to note that in 1952 defendant caused a W-2 form to be filed and tax withheld for him, at his insistence, by Eastern Woodworking Company, a client, whereas presumably he could have received his compensation for services rendered to said company, had he elected to do so, as legal fees for which no W-2 would have been required and no tax would have been withheld. This is of the utmost importance and goes directly to the question of negativing wilfulness. It may be that if the facts had been developed more reliably during investigation by government's agents, the case would not have been recommended by them for criminal prosecution or, such recommendation having been made by the agent, it is possible a higher review would result in a recommendation

that the case not be prosecuted and would have been disposed of civilly for which there are sundry, adequate remedies available to the government under provisions of the Internal Revenue Code. This is especially plausible since the agents, having taken a statement from the defendant and investigated the matter, cancelled an appointment set up by the agents for the purpose of giving defendant an opportunity to come in with counsel and be heard in view of the fact that criminal proceedings were being considered (App. 18, 19, Def. Exh. 2-B). It is customary to grant an administrative hearing in Baltimore in such cases prior to a recommendation for prosecution being made. After such conference is held and after such recommendation is made, the case is sent to the Regional Office in Philadelphia. A conference in Philadelphia was granted in this case but the only hearing was on the record (App. 18), which was erroneous in part and lacking in much information favorable to defendant as noted above. The failure to accord the defendant an administrative hearing in Baltimore would seem to indicate precipitate action on the part of the agents and inadequate consideration of the question whether the case was really one that merited criminal prosecution.

Of especial significance, and as additional evidence which negatives willfulness is the fact (although this is not specifically covered in the testimony, the government will not dispute nor disagree with this statement) that defendant, by claiming all of the exemptions on his W-2 to which he was entitled by law, (which he elected not to do), could have avoided any tax being withheld from the wages he received.

As to every fact in issue in the trial of the case, there is no conflict in the evidence. The controversy here is whether such facts amount to willfulness. Defendant's testimony was frank and candid. He carried on all of his transactions through a checking account; his complete records, for all

years, were available and turned over to the government's agents upon request in order to enable the agents to verify the computations and schedules furnished the agents by defendant.

He had never done anything to conceal or disguise the true nature of his transactions, or hidden anything away.

It is significant to note that the government, in the tax computation, is not claiming the total tax due, but is claiming only a deficiency in tax inasmuch as defendant had paid part of his tax through withholding (App. 11).

SUMMARY OF TESTIMONY OF GOVERNMENT'S WITNESSES

In any criminal prosecution under the income tax laws, the government has a heavy burden of proof to carry in proving the defendant guilty beyond a reasonable doubt of the crime charged.

The narrow and crucial issue in this case is whether the government met this burden of proof under a statute which denounces as criminal the willful failure to file income tax returns.

Four employees of the Internal Revenue Service constituted the only witnesses to testify against defendant.

A summary of their testimony reveals a complete absence of the criminal conduct contemplated by Congress, by the statute, and by the cases thereunder, which will support the heavy burden placed upon the government. Such a summary follows:

Henry T. McNamara (St. Tr. pp. 4-6)

Mr. McNamara is employed by the District Director of Internal Revenue in Baltimore and the only purpose of his testimony was to confirm the fact that defendant had not filed income tax returns for the years involved.

Thomas B. Carney (App. 1-4)

Mr. Carney is employed by the District Director of Internal Revenue and is attached to the Intelligence Division. He first met defendant on November 18, 1955, the latter having come to Mr. Carney's office in response to a letter from the Bureau dated November 14, 1955 (Defendant's Exh. 2A). At that initial interview, which defendant attended alone, Mr. Carney took a question and answer statement under oath from defendant, and Mr. Carney identified the statement as the one introduced at the trial of this case (Government's Exh. 1). Mr. Carney had no further interview with defendant.

The foregoing summarizes the complete direct examination of Carney.

On cross-examination, the following additional information was elicited: At the time of defendant's interview on November 18, 1955, defendant had no records with him; defendant was cooperative; and defendant turned over his records to the agent (Haspert). Mr. Carney did not participate in the investigation other than the original statement (Government's Exh. 1). After the Intelligence Division got into the case, Mr. Carney was substantially in charge of the investigation. Mr. Carney stated he thought defendant had received W-2's from some of his employers, but he didn't know offhand what years were filed for him. Mr. Carney stated that a fraud penalty, which is imposed when there has been an attempt to evade taxes, or for a willful evasion, had been recommended in this case.

The foregoing summary comprises all of the facts testified to by Mr. Carney.

Peter P. Haspert (App. 5-8)

Mr. Haspert is a Special Agent of the Intelligence Division of the Internal Revenue Section. He was present at the first, as well as subsequent interviews of the defendant.

At the request of the agents, defendant prepared and submitted schedules to the agents listing all of his clients and fees received therefrom for the years involved. Thereafter, Haspert verified the accuracy of these schedules from defendant's records, which were turned over to the agents, as well as by verification from the clients whom the agents contacted.

Haspert quotes defendants as having stated, in response to Haspert's question, that he knew he could have filed income tax returns without remittances. (Defendant does not deny this conversation but stated he told Haspert he knew it "now".)

The foregoing consists of the complete direct examination of Mr. Haspert.

On cross-examination, the following additional information was elicited:

There were no material inaccuracies in the schedules of fees prepared by defendant and submitted to the agents.

The foregoing summary comprises all of the facts testified to by Mr. Haspert.

Robert D. Wheeler (App. 8-12)

Mr. Wheeler is a Revenue Agent attached to the District Director of Internal Revenue in Baltimore. Mr. Wheeler calculated the tax liability of defendant for the years involved using the income and expense figures submitted to him by defendant, which figures were found by the agents to be accurate.

From the tax found to be due for the year 1953 in the amount of $1021.32, Mr. Wheeler allowed a credit against that figure of $88.40 for the amount of tax paid by defendant through his withholding, making the deficiency due for 1953 $932.92. For 1954, the tax found to be due was $1041.58 from which the tax paid by defendant through

withholding in the amount of $179.10 was allowed, making the deficiency due for that year $962.48.

There was no cross-examination of Mr. Wheeler and the foregoing summary comprises all the facts testified to by him.

The entire testimony produced by the government against defendant is summarized in the foregoing summaries.

THE COURT'S THEORY OF GUILT

The Findings of the Court on which its conclusion of guilt is based are as follows:

(1) "The failure to file the return for both years was voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent" (App. 33).

(2) "I find that defendant knew that the returns ought to have been filed and that he deliberately failed to file them so that the government would not know the extent of his income and of his tax liability" (App. 33).

(3) "I find that the failure to file was without justifiable excuse" (App. 34).

(4) "If the government did have such a burden (of proving that defendant intended or attempted to evade the payment of taxes) I find that it was met in this case. That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested" (App. 34).

(5) "The reason why the defendant did not file his tax returns, namely, that he did not have the money to pay the taxes is not a legal excuse" (App. 34).

(6) "I find as a fact that the defendant knew that he had to file a return whether or not he paid the tax, and that he knew that he could and should pay the estimated tax quarterly in advance" (App. 34).

(7) The government "has proved beyond a reasonable doubt that the failure to file the returns was willful" (App. 35).

(8) "I am bound to find in this case that the defendant was obligated to file the returns, that he did not file

them, and that such failure to file was willful. . . ." (App. 35).

ARGUMENT

I.

THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROVING AN AFFIRMATIVE WILLFUL ATTEMPT TO EVADE TAX.

In enacting the Internal Revenue Code of 1954, Congress has characterized all criminal offenses under the Internal Revenue Code as "what in substance is the same offense, namely, the attempt to evade tax" (83rd Congress, 2d Session, Report No. 1622, page 147).

The House bill provided uniform penalties for such criminal offenses, but the Senate, recognizing the equities in subjecting misdemeanors to lesser penalties than felonies, revised the penalty provisions of the House bill from 5 years' imprisonment to 1 year, but allowed the $10,000 maximum fine under the House bill stand. The Senate, however, did not qualify its statement that all criminal offenses were in substance the attempt to evade tax.

It is significant that this statement by Congress — that all criminal offenses constitute the attempt to evade tax — was made at the time when Congress brought all criminal offenses together in one chapter of the Internal Revenue Code; and, at the same time, made substantial revisions to various sections of the criminal statutes, including the revision of Section 145(a), now Section 7203.

In view of this clear expression of Congressional intent as to the burden the government should be required to meet in prosecutions for criminal offenses under the tax laws, it is obvious that the proof in this case has fallen far short of proving affirmative willful attempt to evade tax.

In employing the phrase "attempt to evade tax", Congress was undoubtedly cognizant of the Supreme Court's definition thereof which was fully treated in the *Spies* case (*Spies v. U.S.*, 317 U.S. 492). In that case, the Supreme

Court, in deciding what Congress intended by using the word "attempt" in Section 145(b) of the Internal Revenue Code (now Section 7201), stated as follows:

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors."
>
> . . . . . .
>
> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished, and perhaps did not define lest its efforts to do so result in some unexpected limitation. . . . By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

In the *Spies* case, the Supreme Court held that the failure to file returns, and the failure to pay the tax did not constitute the affirmative act necessary to prove an attempt to evade tax.

We are not arguing that the government must prove a felony in order to sustain a conviction for a misdemeanor, though even the Supreme Court noted in the *Spies* case that the difference between the two "is not easy to detect or define". But we do vigorously contend that in a prosecution for the misdemeanor of failing to file returns, Congress intends the government to produce evidence of some affirmative act which would tend to prove an attempt to evade or

defeat the tax, or which would tend to show a tax evasion motive or intent on the part of defendant.

It is reasonable to assume Congress means that the government should prove some positive and affirmative conduct on the part of defendant in prosecutions for criminal tax offenses. Mere failure to act, the Supreme Court has stated, is not sufficient to constitute such affirmative conduct.

As will be treated more fully in a later section of this brief, it is our contention that even if this court rejects the contention made here, namely that the government in this case must prove an attempt to evade tax, nevertheless, we contend the government must still prove some affirmative conduct on the part of the defendant to prove a bad motive, or evil intent which the Supreme Court has said, is required to prove willfulness. (*U.S. v. Murdock*, 290 U.S. 389).

A reading of only a few cases is necessary to see the facility with which the government can convict defendants who are in fact tax evaders, despite the myriad of devices employed by such defendants to evade tax. If a taxpayer has in fact attempted to deceive or cheat his government, it is not at all difficult for an experienced tax investigator to trip him up somewhere during the investigation by showing conflicting stories, explanations inconsistent with the facts; concealment of income, or conduct which unquestionably is fraudulent or deceitful, or evasive.

There is a complete absence of such conduct in this case.

A few examples of what the government could have shown, in order to discredit defendant, had such evidence been available, are as follow:

1. A cash balance sufficient to pay defendant's taxes. This fact would have disproved his explanation of lack of funds.
2. Fees in excess of those listed by defendant on the schedules turned over to agents. The accuracy of the

fees listed, however, was verified by the agents by contacting the clients.

3. Inability of defendant to compile a statement of his income because of absence of such records. This would have disproved defendant's statement that he always intended to file his returns and pay his tax when he had sufficient cash to do so.
4. A current position with all other creditors except the Internal Revenue Service. This would have shown an ability and willingness to pay his debts and a disposition to overlook his taxes.
5. Excessive personal expenditures inconsistent with his avowed depressed financial condition.
6. Some later statement made by defendant, or other evidence, inconsistent with the facts given by defendant in his initial statement to the agents (Exh. 1).

Even as inconclusive as one or all of the foregoing pieces of evidence might be, as well as other examples which could be cited, there is not even that much in the case.

No evidence of any affirmative act of evasion, etc. was introduced into the case, either by the government's own witnesses nor by defendant. As shown above, a failure to file does not constitute the affirmative act contemplated by an attempt to evade tax. No other affirmative act is cited by the trial Court in support of its findings.

The trial Court did not specifically rule that the government had the burden of proving an attempt to evade tax, despite a request for an instruction to that effect. In fact, the Court stated "I do not think it is necessary for the government to prove . . . that defendant intended or attempted to evade the payment of taxes." "But if the government did have such a burden," the Court said, "I find that it was met in this case. That is a natural *inference*

from the evidence in this case and no other motive or purpose has been suggested."

This process of inferring proof of an affirmative attempt from defendant's omission to act is precisely what the Supreme Court prohibited by its opinion in the *Spies* case. Moreover, a later statement made by the trial Court at the time of sentence, would seem to be at variance with a finding that defendant "intended or attempted to evade the payment of tax." The Court said "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

In addition to that, the Court said of this case "this is not one of the most serious types of cases" (App. 39).

There is one colloquy we would specifically bring to the attention of this court as bearing upon the issue of the attempt to evade taxes.

Defendant, as is obvious from the record, contended that the government in meeting its burden of proof, was required to prove an affirmative willful attempt on the part of defendant to evade taxes. Pursuant to this theory the defendant, in the course of his direct examination, began to offer testimony to disprove the existence of any intent to evade taxes. Following the first question in this line of defense, the following colloquy occurred:

> "(The Court) He is not charged with that. I mean, he is not charged under 145(b).
>
> (Mr. Mundy) All right. Well, of course, Your Honor, the reason I asked the question was under our theory it is pertinent. I know that the government does not agree with us, but I thought I should get the factual situation. That was the reason" (App. 26).

We submit that this court is entitled to make the inference from the above colloquy that up to that point in the case, which was after the completion of the govern-

ment's case and well into defendant's testimony, the government had not proved any attempt to evade taxes. Otherwise, the trial Court would have been anxious to hear anything defendant had to say in his defense on that issue.

We submit that the complete absence of any evidence of an affirmative act, together with recognition by the Court that this is not one of the most serious types of cases, shows conclusively that the government has not met its burden of proof and the Court should have granted defendant's request for acquittal.

II.

THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROVING BAD FAITH OR EVIL MOTIVE, WHICH THE STATUTE MAKES AN ELEMENT OF THE OFFENSE.

If this Court rejects defendant's first argument that the Government, although required to do so, has failed to prove an affirmative wiilful attempt to evade tax, we then come to the present argument, namely, that the Government has not met its burden of proving bad faith or evil motive as an element of the offense.

The Court and defendant are in no disagreement that defendant's failure to file, in order to constitute the offense charged, must be willful.

The Court and defendant are sharply divided on the issue of the elements constituting willfulness, and whether the facts of this case amount to proof of willfulness. Defendant contends that they do not, inasmuch as no evil motive has been proved.

This is not a case wherein the Court has cited facts from the record in support of a finding of bad purpose or evil motive, and on the basis of such evil motive finding willfulness.

It is instead a case where the Court cites facts from the record from which facts the Court has inferred willfulness.

without also finding the element of evil motive which is an essential element of the offense.

The Court did not grant any of defendant's requests for instructions that a bad purpose or evil motive had to be proved by the Government, as part of its burden of proof. At the conclusion of sentencing the issues which would be argued on appeal were discussed by the Court and counsel for both parties. Again the Court was asked, inferentially at least, to rule upon the question of evil motive (App. 41).

The Court stated, "I found that the motive which I stated in my opinion was a sufficient motive to satisfy that requirement if such a requirement existed, and I stand by that ruling" (App. 41). The Opinion, however, does not yield up a specific finding of evil motive.

In view of the Court's steadfast refusal to rule that as part of its burden of proof the Government had to prove a bad purpose or evil motive; and in view of the Court's refusal to specifically find an evil motive, though requested to do so, defendant contends his request for acquittal should have been granted.

In sum, it may be fairly stated that the testimony of Government's witnesses, which is summarized in an earlier part of this brief, proved no more than that defendant's failure to file was voluntary or knowing. The Government's proof nowhere near approached proof of an evil motive which the Supreme Court has held is a "constituent element" of crime (*U. S. v. Murdock*, 290 U.S. 389).

We must now respectfully ask this Court, tedious though it may be, to examine with us the findings of the Court enumerated under the section of this brief entitled "The Court's Theory of Guilt", and the evidence which defendant contends will not support a finding of willfulness in this case.

(a) — It was Beyond Defendant's Power to Conceal Tax Liability.

Under the section of this brief entitled "The Court's Theory of Guilt", we have listed eight findings which were set forth in the Court's opinion upon which the Court based its verdict of guilt.

These findings group themselves into four categories, as follows:

(1) Those findings which show no more than voluntary and intentional non-filing, or that such non-filing was without justifiable excuse. In this category are findings numbers 1, 3, 5, 6 and 8. If the Court is right in its view that the findings in this group meet the test of willfulness, *without* specific proof or finding of evil motive, then defendant concedes the Government has met its burden of proof.

(2) Finding No. 4 wherein the Court found that the Government had proved defendant, by his failure to file, "intended or attempted to evade the payment of taxes." Defendant will stand on his contention, as heretofore argued, that there is a complete failure of proof under this finding.

(3) Finding No. 2 that the failure to file was in effect an act of concealment of tax liability. Defendant recognizes this finding as the crucial one to answer.

(4) Finding No. 7 which is the ultimate finding of willfulness by the Court.

Defendant contends that groups 1 and 2 above will not support a conviction, as has heretofore been demonstrated.

Groups 3 and 4 above will be treated in this section of the Brief.

The finding by the Court that defendant knew returns "ought to have been filed and that he deliberately failed to file them so that the government would not know the ex-

tent of hi income and of his tax liability" would appear to be a permissible inference, except for reasons stated hereinafter, and, if such failure were specifically shown to have been prompted by some *evil motive*, then the government would have met its burden of proof. Were it not for the existence of significant facts which we will now point out, this Court could easily fall into the same error as the trial court did in overlooking such facts.

Re-phrasing the finding of the Court involved in this immediate discussion the Court in effect finds that the defendant's failure to file was to prevent the Government from knowing of Defendant's tax liability.

The Court then infers from this that defendant intended not to pay his taxes and that such intention constituted an attempt to evade the payment of his taxes. That this is the Court's inference is stated specifically by the Court, wherein it said, "No other motive or purpose has been suggested" (App. 34).

The indisputable fact is that it was through the efforts of defendant that his taxable status was made known to the Government by his insistence that his various employers withhold tax from his wages and file the necessary W-2 forms with the District Director (sometimes referred to as Collector) (App. 13, 14, 15).

As a result of the filing of W-2 forms and the payment to the Collector of the tax withheld, defendant was aware of the fact that there was an account set up in his name in the Collector's office (App. 16, 28), and it was therefore beyond his power to conceal his tax liability.

The fact that this account remained open in the Collector's Office was knowledge to the Collector that defendant had not filed his final return for each year (I.R.C. Sec. 6011(b); 6051(d); 6201(a); 6204(a)). So the Defendant was not concealing from the Collector the fact that a tax liability existed — the fact is that the Collector was

aware of defendant's liability and that defendant had already paid some tax. The only thing unknown to the Collector was whether defendant's withholding overpaid his tax, in which event the Collector owed defendant a refund; or whether defendant owed more tax. The Collector could easily ascertain this fact by communicating with defendant, as he was in fact required by Statute to do (I.R.C. Sec. 6201(a); 6204(a)), and asking him to file his return if one was due. That is precisely what the Collector did when he wrote to defendant on November 14, 1955 (Def.'s Ex. 2A). It will be noted that the address on this letter is the same address appearing on defendant's W-2 for 1952. This is indisputable proof that defendant's insistence that a W-2 be filed for him (App. 13) put the Collector squarely on notice of defendant's taxable status. It is true that the tax shown on the W-2 was not the full tax due by defendant, but the reason the balance of tax was not paid and his returns were not filed was because defendant did not have the funds to pay. Even if the lack of funds is not accepted as defendant's reason for not filing his returns, the record will not support the finding that defendant failed to file so that the government would not know "of his tax liability." Defendant's tax liability was known by the Government immediately upon receipt by it of the respective W-2's which defendant caused to be filed. That defendant caused W-2's to be filed has not been disproved by the Government (App. 25; Govt.'s Ex. 1, page 6).

The Collector, at all times, here involved, could have written to defendant to request the filing of returns so that the open accounts could be closed out either by a refund or by the payment of additional tax. In fact, it was the Collector's responsibility, knowing of the open accounts, to communicate with defendant in order to bring his account to a current status (I.R.C. Sec. 6204(a)). The payment of taxes to the Collector by the withholding method

caused an account to be set up each year in defendant's name in the Collector's office. Defendant was aware of this (App. 16, 28). After April 15th of any year, the filing date, defendant's account was in an "incomplete" status (Sec. 6204(a)) or what is usually referred to as a delinquent status in the Collector's office. It was delinquent in that the final return had not been filed and this fact was officially known to the Collector.

It is significant to note the testimony of Agent Wheeler wherein he testified that the amount of tax the government was claiming for the years involved, was not the total tax due, but a *deficiency* in tax, because part of defendant's tax had already been paid by withholding (App. 11). As the Internal Revenue Code states, the tax was "deemed to have been paid by (defendant)" (I.R.C. Sec. 6513(b)).

It cannot be disputed that when defendant caused W-2's to be filed for him, which fact is uncontroverted, he was causing an income return to be filed with the Director of Internal Revenue. The Government's own ruling has held this to be so (I.T. 3826, 2 Cum. Bul. 53), quoted in full in footnote 1 hereof).

Upon receipt by the Collector of tax money for defendant's account, an account was set up in defendant's name and a tax was immediately assessed against him in the amount of withheld taxes received by the Collector (I.R.C. Sec. 6201(a)(1)).

It cannot be maintained, therefore, that the failure to file returns prevented the government from knowing of defendant's tax liability. The facts in this case simply will not support such contention. However, if defendant had thereafter filed a return showing just enough income to result in a tax which would equal the amount withheld, then defendant would have unquestionably been guilty of a fraud upon the government.

Defendant contends that the worst the evidence against him shows is that he is a procrastinator. But it seems to us that the Government procrastinated in this case, too. The Government waited several years before it took the steps available to it to secure defendant's delinquent returns and during the entire period of such delay, the Government was aware of defendant's delinquency.

We are not contending that it is the Government's duty to write to all taxpayers to secure their returns. Obviously, the more defaulting taxpayers there are, the greater the burden upon the Government to collect its taxes. But Congress has seen fit to provide for such defaulters by appropriate sanctions in the form of monetary penalties.

We do contend, however, that where the Government has been put on notice by the taxpayer himself, that he is in a taxable status, the Government should take cognizance of its own delinquency, where it was clearly within its power and as has been shown was required to rectify such delinquency known to exist long before it took steps to do so. The Government, under such circumstances, should be under a very heavy burden of proving that this case is "more grievous than a case for civil penalty," as the Supreme Court indicated should be done where the Government jumps from the invoking of civil penalties to criminal prosecutions (*Spies v. U. S.*, supra).

Even if this Court does not accept any of defendant's explanations, the proof amounts to no more than proof of intentional disregard of Rules and Regulations. Congress has anticipated there will be such taxpayers and has provided accordingly in Section 6653(a) of the Internal Revenue Code of 1954 which reads as follows:

> "(a) *Negligence or Intentional Disregard of Rules and Regulations with respect to Income or Gift Taxes* — If any part of any underpayment . . . is due to negligence or intentional disregard of rules and regulations (but without intent to defraud) there shall be added

to the tax an amount equal to 5% of the underpayment."

The trial Court found, in its finding No. 1, that defendant's failure to file was, among other things, intentional. The Court did not make a finding that the failure to file was fraudulent. The Court did, in fact, negative fraud when it stated that "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

Clearly, then, the proof amounts to no more than the "intentional disregard of rules and regulations (but without intent to defraud)", for which infraction Congress has provided what it deems to be a sufficient penalty in the above quoted sanction.

(b) — The Prosecution and Proof Adduced are based upon no more than "Probable Cause" of Guilt.

We respectfully direct this Court's attention to the Criminal Information, with especial reference to the affidavit attached thereto (Record on Appeal, page 3).

This affidavit is made by Special Agent Haspert and the significant wording thereof is as follows:

> "As a result of this investigation, he is satisfied that there is probable cause to believe that the said (defendant herein) * * * did willfully and knowingly fail to to make said income tax returns * * *."

Between November 18, 1955, the first day Haspert saw defendant, and April 22, 1957, the date of trial — approximately 18 months — Special Agent Haspert, together with other experienced tax investigators, were, or should have been, securing evidence to support this criminal prosecution, inasmuch as the recommendation for criminal prosecution originated with them (Def. Exh. 2B, App. 50).

Inasmuch as Haspert cited no specific acts of willfulness in his affidavit of "probable cause", it is reasonable to ex-

pect, in fact, it would be mandatory, that he or other government witnesses would testify to facts which clearly prove criminal conduct on the part of the defendant.

Haspert's testimony, as well as testimony of others, reveals an abysmal lack of incriminating evidence. There is not a scintilla of evidence which even tends to cloak this defendant in criminality — unless the mere failure to file constitutes the crime, for the shocking fact is that that is all Haspert's and other government testimony amounts to.

Nor has the defendant himself, though he testified at length, supplied this vital link in the government's burden of proof. On the contrary, Defendant's testimony violently protests and disclaims any willfulness or evil motive.

We submit that if the government is going to dump tax cases into the laps of trial courts, it should be prepared with indisputable proof of criminality, to back up the charges made against defendants instead of putting on a case amounting to no more than "probable cause" and forcing the trial courts, as was done in this case, to wrestle with presumptions, inferences and other intangibles in arriving at guilt. Anyone who is the least bit familiar with tax fraud cases knows how easy it is to prove the necessary elements of criminal willfulness, concealment, evasion, fraud, etc., where such elements actually exist.

The ends of justice would require such specific proof, particularly since tax prosecutions are on the increase according to figures released by the Department of Justice.

The present case is a graphic illustration of why it is necessary that the Government be required to prove an "attempt to evade tax" as Congress has indicated should be the test in criminal tax cases, rather than having the proof rest, as in this case, upon suspicions, presumptions and inferences, as we will now demonstrate.

Where defaults in rigid adherence to statutory requirements for filing returns and paying taxes are involved, we

must condition ourselves on first being exposed to the facts, to resist characterizing all such defaulters as tax evaders, or cheaters, or criminals.

Even Federal Judges may sometimes, unknowingly, allow factors learned from their experience with other tax prosecutions, to weigh more heavily in their deliberation than the facts of the particular case they are considering would warrant. There is some evidence that that may have happened in this case, and is proof positive as to why the Government should not dump "probable cause" cases into the laps of judges without following their allegations of probable cause up with some proof of affirmative criminal conduct.

(A careful examination of the whole record here could easily support the following startling conclusion: That the Government's agents, have inferred fraud from the mere failure to file; on the basis of such inference, Haspert made an affidavit of "probable cause" so as to get the case to Court in the hope and expectation that the Court would back them up and, on the mere inference of fraud, find defendant guilty beyond a reasonable doubt. Unfortunately, that it what the Court did.)

In the present case the Government proved (using the same figures supplied to the Agent by defendant) that defendant had sufficient income to require the filing of returns; proved the tax computations showing the deficiency due; and proved that no returns were filed. The defendant admits all of this. The Government's proof ended at that point.

The trial court, as will be shown, must have attached considerable importance, among other factors in arriving at a guilty verdict, to the fact that defendant had not paid his taxes. That is the natural inference from the finding of the Court that defendant's failure to file was "so that the gov-

ernment would not know the extent of his income and of *his tax liability*" (App. 33). (Italics supplied.)

The next presumption made by the Court must have been that the failure of defendant to pay his taxes permits the inference that his failure to file was in some way related to a willful failure to pay and therefore, such failure to file was willful. That the failure of defendant to pay his taxes was a factor of considerable importance to the Court is apparent from the following statement made by the Court at time of sentence:

> ". . . if business men are to be sent to jail for the failure to pay income taxes, as this court has pretty regularly done . . . the Courts cannot treat differently the lawyers whom they know, . . . and the business men whom they do not know. . . ." (App. 38).

The Court's reference to the regularity with which business men were sent to jail *for failure to pay income taxes* revealed a situation with which we were unfamiliar. An examination was made by this writer of the Court dockets in the Clerk's office of the Federal District Court for Maryland, covering the period of the preceding ten years. The examination failed to disclose a single prosecution during the ten years, *for failure to pay income taxes*.

Obviously, therefore, the Court has not been sentencing defendants to prison for failure to pay income taxes upon their conviction for other offenses. But what the Court must have meant by its statement was that where convictions have been secured, which has been pretty regular, in other tax prosecutions, the failure to pay their taxes has been proved to be due to tax evasion motives, the crime for which they must have been prosecuted; or that the failure to pay was connected with proof of some affirmative attempt to evade the payment of their taxes, such as the filing of a fraudulent return. This latter crime, the Supreme Court has said, is the "gravest of offenses against the revenues" (*Spies v. U.S., supra*). The proof in the present case

simply will not support any tax evasion motives; nor any other evil motives. The crucial fact of this case is that it was beyond the power of defendant to conceal his tax liability, as has heretofore been shown.

Lest there be any doubt as to the point we are trying to make, we will restate it. We do not intend to imply that the defendant was convicted or sentenced because of his failure to pay his taxes. He was not charged with that offense nor was he convicted thereof. But we do contend that the Court must have considered the failure of defendant to pay his taxes to permit the inference that such failure to pay taxes was willful (of which there is no proof), and that this in turn was sufficient to permit the inference that the faliure to file returns was willful.

We submit this is precisely the situation Congress is trying to prevent when it specifically states that all criminal offenses under the tax laws are in substance "the attempt to evade taxes", which would require, under such burden, proof of an affirmative willful attempt of tax evasion.

Furthermore, the Supreme Court has indicated an extremely rigid test should be invoked in cases involving *failure to pay taxes*. Said the Supreme Court:

> "In view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there has been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such cases to include some element of evil motive and want of justification in view of *all the financial circumstances of the taxpayer.*" (*Spies v. U.S., supra.*) (Italics supplied.)

It would appear that the trial court leaned heavily in finding guilt in this case, upon the inference that defen-

dant concealed his tax liability so that he would not have to pay the tax, and that such non-payment of taxes supplies the element of willfulness in his non-filing. If that is so, and there is ample evidence that it may be so, then the trial court has ignored the financial circumstances of taxpayer which the proof indisputably shows was insufficient to pay his taxes. The Supreme Court says the financial circumstances of defendant is a crucial consideration in the proof of the necessary element of evil motive.

Assume for the moment that defendant had been prosecuted for failure to pay his taxes. In view of defendant's poor financial condition, which is admitted, it is reasonable to assume, in view of the Supreme Court's language quoted above, that defendant would have been acquitted of such charge, carrying with it the irresistable conclusion that there was no evil motive in such non-payment of taxes. Now, if defendant, exercising his own judgment, as was done in this case, determines not to file a return because he has no funds with which to pay the tax, and intending to file and pay later when he has the funds, as defendant testified, it seems to us that the failure to pay in such case, based as it is upon lack of funds, which condition would have exonerated him from any evil motive in a *failure-to-pay prosecution*, cannot be the basis for an inference of evil motive in supporting a willful failure to file prosecution in the absence of the strongest sort of affirmative proof of evil conduct. Such proof is completely absent in the present case.

We submit that the Court has attached substantially more weight to defendant's failure to pay his taxes than the principal charge of failing to file justifies in this case. We have shown that the Supreme Court in the *Spies* case, *supra*, would require an extremely rigid burden of proof in order to convict a person of failing to pay his taxes. Moreover, Congress has also indicated its resistance to com-

pel taxpayers to pay promptly by allowing taxpayers who are under financial hardships up to 30 months to pay *after* the date fixed for payment of a *deficiency* (I.R.C. Sec. 6161(b)):

This section of the Code prohibits such grace period "if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax".

Under the provisions of the above Code section, if a deficiency in tax were not determined for two or three years after the tax was due, the taxpayer, if he could prove undue hardship, as defendant here probably could, could be allowed an additional 30 months to pay. Under such circumstances, it appears that Congress has sanctioned a period of years within which to pay taxes.

If the deficiency in tax were due to negligence, intentional disregard of rules and regulations or fraud with intent to evade tax, defendant would not be entitled to the extended period.

Applying this Congressional test to the present case, we assume the Court's remarks regarding failure to pay taxes are not intended to apply in situations which meet the "financial hardship" test approved by Congress.

Although the only reason assigned to defendant's failure to file his returns was the lack of funds (nor did the government testify to any other reason), we assume the Court disregarded that explanation of defendant. If the Court did not disregard it, however, and there is some evidence that it did not disregard defendant's financial condition because the Court recognized that defendant was not "accumulating money and trying to hide it away" (App. 37), then the Court's reference to defendant's failure to pay his taxes cannot be used to impute or infer any evil motive.

If the Court did disregard the "financial hardship" explanation, then the Court's reference to defendant's failure

to pay his taxes must have been intended to impute to defendant either negligence, intentional disregard of Rules and Regulations, or fraud with intent to evade tax, — the same grounds recognized by Congress as being incompatible with the financial hardship theory.

But the Court has specifically rule out negligence in the first finding (App. 33).

In the same finding, the Court stated that the failure to file was, among other things, "intentional". In this same finding, the Court apparently means that it was intentional in that it was "voluntary" (which the Court specifically says) and does not mean to say that it was intentional and fraudulent (which the Court does not say).

If the Court meant to say of intentional that the failure to file was an intentional disregard of rules and regulations but without intent to defraud, then Congress has stated that a civil penalty is quite sufficient for such infractions.

Since the Court did not say that the failure to file though intentional was also fraudulent, which word would have been very simple to insert in the Court's first finding, if the Court so found, and since fraud can never be presumed, this Court must assume that the trial court did not find nor did it intend to find that the failure to file, or defendant's failure to pay his taxes, was fraudulen, with intent to evade taxes.

Defendant filed many requests for instructions setting forth his theory that a bad purpose or evil motive was an essential element in the Government's burden of proof, and had to be specifically proved. The Court time and again resisted such a finding and said you cannot "pin down the burden on the Government in this case and prove one particular element" (App. 36).

We submit that an evil motive is an essential element in the case, and in the absence of any finding of evil motive,

the Court should have granted defendant's request for a directed verdict. (*U.S. v. Murdock*, supra).

(c) — Murdock Case Misapplied by Trial Court

The trial Court specifically indicated that it was relying upon the *Murdock* case, in addition to others, in reaching its findings in this case (App. 33). Its opinion discloses in the wording thereof, such reliance.

We respectfully submit that the Court has misinterpreted the Supreme Court's language as set forth in said case.

The Supreme Court stated that the word willful "often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental". "But", said the Court, "when used in a criminal statute it generally means an act done with a bad purpose. . . ." (*Murdock*, supra).

The defendant in the *Murdock* case had been indicted under a very similar statute to the one involved in this case.[2] The defendant's failure in the *Murdock* case was the alleged willful failure to supply information to revenue agents. The Supreme Court, in affirming the Circuit Court of Appeals reversal of defendant's conviction stated: "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense". (*U.S. v. Murdock*, 290 U.S. 389). In the present case, the Court found that defendant's failure to file his returns was, among

[2] Section 1114(a) of the Revenue Act of 1926 declares: "Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

other things, "intentional" and without "legal excuse" and without "justifiable excuse", but it did not find that such failure was prompted by bad faith or evil motive, "which", the Supreme Court has said, "the statute makes an element of the offense".

Just four days before the Supreme Court decided the *Murdock* case on December 11, 1933, the Circuit Court of Appeals for the Fifth Circuit came to the same conclusion in a failure to file case and stated that where statutes denounce as criminal the willful doing of an act "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence". (*Hargrove v. U.S.*, 67 F. 2d 820.)

A recent case in the United States Court of Appeals for the Ninth Circuit seems to us to clarify the meaning of the *Murdock* case. In *Block v. U.S.*, 9th Cir. (221 F. 2d 786, decided April 11, 1955), the Circuit Court of Appeals, upon its own motion, noticed error in the trial Court's interpretation and application of the *Murdock* case as expressed in the trial Court's instructions. The Circuit Court's opinion in part states as follows:

> "We think presumptive intent has no place in this case. . . . (Citing *Morissette v. U.S.*, 342 U.S. 246.)
>
> "The conclusion sought to be supplied by presumption in the *Morissette* case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.
>
> (Erroneous Instruction on Willfulness)
>
> "The trial Court further instructed the jury as follows:

"'Willfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*

"'*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act*'." (Italics supplied.)

"We think that the italicized portion of the above instruction is erroneous in this case.

"This portion of the Court's charge apparently was taken from the language of the Supreme Court in *U.S. v. Murdock*, 290 U.S. 389 at 394. The *Murdock* case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 which sections were identical. Those sections provided that:

"'Any person * * * required by law or regulations * * * to supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor * * *'."

"When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word 'willfully' is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

"'The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense'."

"The *Murdock* case itself does not apply the definition of 'willfully' used by the trial Court in the instant Section 145(b) case."

CONCLUSION

We submit that at most the government's case is bottomed upon the suspicions harbored by the government's witnesses who investigated defendant's failure to file, and as a result of such suspicions, made oath that there was "probable cause" of guilt. The same agents testified to no more effect than that. Defendant, in his forthright testimony, completely meets and, we submit, overcomes the allegations and suspicions against him.

Francis Bacon has given suspicions their rightful place when he states in his *Essay of Suspicion*:

> "Suspicions amongst thoughts are like bats amongst birds, — they ever fly by twilight. Certainly they are to be repressed, or, at the least, well guarded. For they cloud the mind. . . . Certainly, the best means to clear the way in this same wood of suspicion, is frankly to communicate them with the party that he suspects. For thereby he shall be sure to know more of the truth of them than he did before. . . ."

Although the agents did communicate their suspicions to defendant, they cancelled the appointment wherein he could have given the agents "more of the truth" of their suspicions than they had before.

The facts in the present case and what they show, are not too unlike the cloud observed by Hamlet in his dialogue with Polonius:

> "Hamlet: Do you see that cloud that's almost in shape like a camel?
>
> Polonius: By the mass, and it's like a camel, indeed.
>
> Hamlet: Methinks it is like a weasel.
>
> Polonius: It is backed like a weasel.
>
> Hamlet: Or like a whale?
>
> Polonius: Very like a whale."

In other words, had the government's agents who investigated this matter and testified for the government herein concluded that the failure to file was without reasonable cause, but not due to willful neglect (I.R.C. Sec. 6651(a)), no one could say that that disposition of the case would have resulted in a travesty on justice, or a strained construction of the facts here involved. Such administrative determination would have had the result of imposing a 25% civil penalty in this case.

Similarly, had the agents concluded that the failure to file was due to "negligence or intentional disregard of rules and regulations" (Sec. 6653(a)) thereby invoking a 5% civil penalty, it cannot be said that that would be an unjust, or unreasonable disposition of the case.

We fail to see how the facts in this case make it one which is "more grievous than a case for civil penalty", thereby necessitating criminal sanctions, which the Supreme Court has indicated in the *Spies* case, supra, is one of the considerations which inferentially, at least, the administrative disposition should clearly be able to show.

No one, we submit, can point to any single fact in this case and say that such fact clearly and unmistakably tars defendant with criminal conduct thereby making the case one which is inappropriate for civil, or administrative, disposition.

We respectfully urge the court to well consider the following observation which none can doubt might have been possible in this case had dame fortune been more on defendant's side. If the defendant, either on his own initiative or through counsel who is familiar with Bureau procedure, had gone to the Internal Revenue Service at any time prior to November 14, 1955, the date of the first letter from the Service, for the purpose of arranging for the liquidation of his tax liability, it is not at all beyond the realm of possibility, indeed, it is quite possible inasmuch as there is statu-

tory authority for such disposition, that the Internal Revenue Service would have *then* computed the deficiency owed by him and arranged for him to have *as much as 30 months* within which to liquidate the liability (I.R.C. Sec. 6161(b)).

Such period of grace which conceivably could have been available to defendant, though under the present circumstances is now foreclosed to him in view of the fact that he borrowed the money and paid his taxes prior to the trial, should have the effect of completely nullifying the inferences drawn by the trial Court from defendant's failure to pay his taxes.

We respectfully submit that the "voluntary, purposeful, deliberate and intentional" failure to file is not sufficient to meet the test of willfulness laid down by the Supreme Court in the *Murdock* and *Spies* cases, supra, nor the *Hargrove* nor *Block* cases, supra, nor is the fact that such failure was without legal excuse or "without justifiable excuse". Nor, we respectfully submit, is there any evidence of concealment of obligation or tax liability. Indeed, the affirmative acts of defendant were specifically designed to reveal his tax liability, and having performed such acts (the causing of W-2's to be filed), it thereafter was beyond his power to conceal his tax liability.

As to the question of evil motive — which, the Supreme Court states, the statute makes an essential element of the offense (*Spies*, and *Murdock*, supra) — the record in this case will not support such a finding, if such a finding were in fact made by the Court. Quite the contrary of a finding of evil motive, the Court's statements made from time to time that defendant was not engaged in "any improper activity" and that defendant was not accumulating money and "trying to hide it away", and that this was not one of "the more serious cases", together with the Court's statement that you cannot "pin down the burden on the government in this case to prove one particular element", augurs against a finding of evil motive.

It unquestionably appears that the Court has found defendant guilty of willfulness, but not because of defendant's evil motive, inasmuch as the Court studiously avoided making such finding.

Even the Court manifests doubt or uncertainty in its opinion, or at least, it leaves unsettled exactly what elements the government's burden of proof encompassed, as well as uncertainty as to whether the government *actually* met its burden, or only *may have* met its burden. These uncertainties are apparent in the Court's statement that

> "I do not think you can pull individual phrases out of an opinion, as some of your requests for instructions do, and pin down the burden on the government in this case to prove one particular element or one particular way of proving willfulness and say that they must prove that when they *may have proved* other alternative avenues of reaching the same conclusion" (App. 36). (Italics supplied.)

We submit that the government in this case was required to prove "one particular element" in order to prove willfulness, namely, evil motive, and we do not see how any "alternative avenue of reaching the same conclusion" (of willfulness) can be substituted for what the Supreme Court has said is "an essential element of the offense" (*Murdock*, supra).

Certainly, neither the government's case, nor the record on the whole will reveal nor will it support a sharp, clear-cut, free-from-doubt finding of evil motive.

We respectfully submit that the Court should have granted defendant's request for a directed verdict.

Respectfully submitted,

R. Carleton Sharretts, Jr.
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Baltimore 2, Maryland
Attorney for Appellant

APPENDIX TO APPELLANT'S BRIEF NO. 7448

TESTIMONY

(St. Tr. 6-11):

THOMAS B. CARNEY,

was called as a witness for and on behalf of the defendant [sic. Government] and, having been first duly sworn, was examined and testified as follows:

(The Clerk) State your full name.

(The Witness) Thomas B. Carney.

DIRECT EXAMINATION

By Mr. Pierson:

Q. Where do you live, Mr. Carney? A. 745 Charing Cross Road, Baltimore, Maryland.

Q. And by whom are you employed? A. District Director of Internal Revenue, attached to the Intelligence Division.

Q. Are you acquainted with the defendant in this case, Arold H. Ripperger? A. Yes, sir, I am.

Q. When did you first meet him? A. On or about November the 18th, 1955.

Q. And what was the purpose of that meeting? A. Mr. Ripperger had called at our office as a result of a letter directed to him concerning the filing of income tax returns.

Q. Did you discuss this matter with him? A. Yes, sir, I did.

Q. Was the interview that you had reduced to writing? A. Yes, sir, it was taken under oath.

Q. And do you remember that interview? A. Yes, sir, I am familiar with it.

Q. Would you glance at this and tell me what this paper is, Exhibit No. 3, I think. A. It is Exhibit 3 of the Special Agent's report, and it is the testimony of Arold H. Ripperger, taken in the office of the Intelligence Division, Baltimore, Maryland, on Friday, November 18th, 1955 at approximately 2 p.m.

(Mr. Pierson) I offer it in evidence.

Would Your Honor want me to read it or have the witness read it?

(The Court) Is the witness familiar with it? Are you going to ask him any more questions about it?

(Mr. Pierson) The witness is familiar with it, but he would simply summarize what the report says. I think the report would probably be more in detail.

(The Court) I think I better read it myself, then.

(Mr. Mundy) No objection.

(The Court) The defendants have seen it?

(Mr. Pierson) You have seen it?

(Mr. Mundy) Yes, we have seen it.

(The Court) If you would like to read it again, you can do it now.

(Mr. Mundy) I have a copy here, Your Honor. In one part of the statement, Your Honor, Mr. Ripperger says, as I recall it, he did not intend to take advantage of obligations, and we suggest, Your Honor, that a look at the context will indicate that it meant he did not intend to take advantage of limitations.

(The Court) That suggestion is made in the brief which you filed, and it seems plausible.

(Mr. Pierson) Yes.

(The Court) From the context.

(The Clerk) Government's Exhibit 1.

(Statement of Defendant before Special Agents dated November 18, 1955 was marked Government's Exhibit 1.)

Q. (Mr. Pierson) Mr. Carney, did you have any further interview with this defendant? A. No, sir, I didn't.

Q. Mr. Haspert was with you at the time? A. Yes.

(The Court) I have read it.

(Mr. Pierson) Witness with you.

CROSS EXAMINATION

By Mr. Mundy:

Q. Mr. Carney, at the time of this interview, Mr. Ripperger had none of his records with him, did he? A. No, sir, he didn't.

Q. And you took a statement from him the very first day he came into your office? A. Yes.

Q. He came to your office, and you took a statement from him before he left the office? A. That's correct.

Q. He was cooperative with you, I take it? A. Yes, sir, he was.

Q. And he assisted you in reconstructing his income for the years in question, 1953 and 1954? A. I can't answer that, Mr. Mundy, because I didn't participate in the investigation other than the original statement.

Q. Have you investigated as to how his income was reconstructed? A. Yes, sir.

Q. What is your knowledge on that? A. To the best of my understanding he turned over his available records to the Agent.

(Mr. Pierson) Will you speak louder?

(The Witness) It's my understanding that he turned over his available records to the Agents to compute his corrected income.

Q. (Mr Mundy) One of the Agents was Mr. Haspert, was he? A. Yes.

Q. Did you or Mr. Haspert write to the clients of Mr. Ripperger about any fees that had been paid to him during these years, referring to 1953 and 1954? A. I can't answer the question, Mr. Mundy, directly because I didn't write. It is my understanding that Mr. Haspert did write.

Q. After your Intelligence Division got into the case, were you in charge of the investigation? A. Substantially, yes.

Q. On some occasions, according to my information, Mr. Ripperger reported fees that were larger than clients informed your agents had paid him the fees; is that correct? A. I don't know.

Q. Did your investigation disclose that W-2's were filed on some occasions? A. I think Mr. Ripperger had received W-2's from some of his employers, yes.

Q. Would you know off-hand during what years W-2's were filed for him? A. No, I wouldn't know.

Q. You imposed a fraud penalty in this case, did you not? A. It hasn't been imposed as such; it has been recommended.

(The Court) Would you read that answer back?

(The last answer was read by the Reporter.)

Q. (Mr. Mundy) A fraud penalty is imposed, is it not when there has been an attempt to evade taxes? A. Wilful evasion or wilful — that's correct, yes.

(Mr. Mundy) May it please the Court, that's the only cross-examination we have at this time.

* * * * * * *

(St. Tr. 12-23):

PETER P. HASPERT,

was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

(The Clerk) State your full name for the record.

(The Witness) Peter P. Haspert.

DIRECT EXAMINATION

By Mr. Pierson:

Q. Where do you live, Mr. Haspert? A. 19 North Wickham Road, Baltimore.

Q. You are associated with the Director of Internal Revenue, Baltimore, Maryland? A. That is right.

Q. In what capacity? A. As a Special Agent, sir, Intelligence Division.

Q. Do you know the defendant, Arold H. Ripperger, Jr.? A. Yes, sir, I do.

Q. Were you present at the first interview, the transcript of which has been offered in evidence? A. I was, yes.

Q. And did you subsequently interview the defendant? A. Yes, I did.

Q. Under what conditions? Just tell us what happened. A. Well, sometime in February Mr. Ripperger was supposed to bring in his records, and he came into the office, and at that particular time arrangements were made to go out to his house, his residence, and pick up the records in his residence.

Q. You did that? A. I did, yes.

Prior to going out to his house he was asked if he was aware that he could have filed income tax returns without remittances, and Mr. Ripperger stated that he was aware of that fact.

Q. What was the date of that? Do you have a memorandum of that in your report? A. I do, sir.

Q. Will you tell us the exact date? A. February 7, 1956.

Q. Was someone besides you and Mr. Ripperger present at that time? A. Yes, sir.

Q. Who was it? A. Mr. Wheeler.

Q. This gentleman here? A. Yes, sir, Internal Revenue Agent.

Q. You then went out and got the records? A. That's correct.

Q. And from those records did you and the defendant reconstruct his income for the years 1953 and 1954? A. We did, sir.

Q. What did you find his income for those years to be? A. The gross income for the year of 1953 was $6,694.19, and for the year of 1954, the gross income was $7,175.31.

Q. Did you have any further contact with the defendant? A. Yes, sir, we did.

Q. When was that and tell us the purpose of it. A. On various occasions, in reference to going over some of the fees and the clients that Mr. Ripperger represented, and in order to ascertain the correct amount of the fees received we went over the schedules that had been prepared by him and submitted by him.

Q. Do you have those schedules which he prepared and submitted to you? A. Yes, we do.

Q. Would you see if you can find them? A. Here they are, sir.

Q. These yellow papers are the schedules? A. They represent the schedules submitted by Mr. Ripperger.

Q. And whose handwriting are they? A. That is Mr. Ripperger's.

(Mr. Pierson) I offer these in evidence, Your Honor. I offer these schedules in evidence as Government's Exhibit No. 2.

(The Clerk) Government's Exhibit 2.

(Schedules of Defendant for years 1950 to 1954 were marked Government's Exhibit 2.)

(Mr. Pierson) Witness with you.

(The Court) Have you seen them, Mr. Mundy?

(Mr. Mundy) No, sir, but there is no objection to them.

(The Court) Do you wish to see them before you cross-examine?

(Mr. Mundy) I would like to take a look at them.

CROSS EXAMINATION

By Mr. Mundy:

Q. Mr. Haspert, what years do these schedules cover? Would you like to take a look at them? A. Yes. They cover for the years 1950, 1951, 1952, 1953, and 1954.

Q. And they are in Mr. Ripperger's handwriting? A. Yes, sir.

Q. And they show the fees that he received during those years? A. That is correct, sir.

Q. And did you make any independent investigation to see whether the schedules are correct or not? A. We did, yes.

Q. And did you find them to be correct? A. We did with the exception of possibly two or three.

Q. Two or three fees? A. That's correct.

Q. Did you find that his schedules understated his fees or overstated his fees? A. Well, let's see in — (referring to papers) —

Q. Well, Mr. Haspert, I did not want to put you to a great deal of trouble. Maybe we can do it simpler than that. You said that you found during those years, 1953, 1954, several inaccuracies? A. Well, I wouldn't say inaccuracies. In other words, Mr. Ripperger had probably reported income in 1953 which should have related to the year 1954, and vice versa.

Q. So it was rather a question as to in which income the income went than as to an understatement or overstatement of fees; am I correct in that? A. That's correct.

Q. And no other inaccuracies; is that correct? A. That's correct, sir.

Q. And he prepared those himself, the statements, the schedules? A. Yes, he did, sir.

(Mr. Mundy) Thank you very much.

(Mr. Pierson) That is all, Mr. Haspert. Would you just leave that here.

(The Witness) Yes.

ROBERT D. WHEELER,

was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

(The Clerk) State your full name for the record.

(The Witness) Robert D. Wheeler.

DIRECT EXAMINATION

By Mr. Pierson:

Q. And your address, Mr. Wheeler? A. 3800 Beech Avenue.

Q. Would you keep your voice up so His Honor can hear you? You are connected with the Director of Internal Revenue, Baltimore, Maryland? A. That is correct.

Q. In what capacity? A. Internal Revenue Agent.

Q. And were you in that capacity connected with the interview of Mr. Arold Ripperger? A. I was.

Q. And did you calculate his tax liability? A. I did.

Q. For the years 1953 and 1954? A. That's right.

Q. What did you find that liability to be for 1953, and how was the figure made up with reference to the income figure? A. For the taxable year 1953, we found there was professional fees of $5,977.01.

(Mr. Mundy) May I have that figure, please?

(The Witness) $5,977.01.

Wages received as an organist, $1,546.68, making a gross income of $7,523.69. Against that there was office expenses allowed in the amount of $329.50.

Q. (Mr. Pierson) Where did you get that figure? A. That figure represented — our examination disclosed that the amount represented expenditures made for telephone, stationery and stamps incurred in the performance of his legal work.

In most cases they were expenses that Mr. Ripperger submitted to us that he had.

Q. You mean, you accepted his figures of expense? A. Yes.

Q. (Mr. Murphy) Is that for the year 1953? A. '53, yes.

Q. (Mr. Pierson) And that gave you a net income of what? A. That was a net income after allowing the standard deduction of $500, the net income of $6,694.19.

(The Court) You people have been calling that the gross income.

(The Witness) That's the net taxable income.

(Mr. Pierson) Net taxable income.

(The Witness) In other words, the liability is determined by that figure.

(The Court) Well, do you want to modify the stipulation to show that?

(Mr. Pierson) Yes, Your Honor.

(The Court) The net says before deductions, whereas I understand it is after exemptions.

(Mr. Mundy) Yes.

Q. (Mr. Pierson) Now, did you make any adjustments for differences in fees that were submitted, the amount that had originally been reported to you by Mr. Ripperger? A. The only exception we found to the records that he submitted to us and subsequently verified by furnishing the original records was that in one case a client had paid him fifteen dollars that he failed to include in his record, and in another case a client had paid it in 1954, and his records showed that he picked it up in 1953. So that it was simply an off-set of one year to the other.

I think the total discrepancy amounted to about fifteen dollars. That was the only discrepancy that we found.

Q. Wasn't there also an overstatement by him that you found of a fee from a client of thirty-five dollars? A. That overstatement was based on the fact that he had included it in 1953, but actually the taxpayer paid it in 1954, and he was on a cash basis.

Q. Would you check your records as to the accuracy of that? A. Well, here, I only have my—

(The Court) Well, as I understand it, this is relatively trifling, when he was asked to hand in schedules, he handed in schedules that were substantially accurate except for a few trifling discrepancies?

(Mr. Pierson) Yes.

(The Court) Which have no bearing upon the case.

Q. (Mr. Pierson) What taxes did you calculate for the year 1953 as being due under those figures that you just testified to? A. The deficiency based on a net income of $6,694.19 was $1,021.32.

Q. (Mr. Mundy) Is that the tax? A. That was the deficiency.

(The Court) Does the deficiency mean the total tax?

(The Witness) That's the tax liability that should have been reported.

Against that he had taxes withheld because of his services as an organist of $88.40, making it a net deficiency of $932.92 for the year 1953.

Q. (Mr. Pierson) Now, for the year 1954, what are your figures? A. For the year 1954, professional fees $6,551.93.

(The Court) Give me that figure again.

(The Witness) $6,551.93.

(Mr. Mundy) And 93 cents?

(The Witness) Ninety-three cents.

(Mr. Mundy) Thank you.

(The Witness) Wages as organist, $1,500.

Gross income $8,051.93. Business expenses allowed $376.62, making it a net taxable income, net income of $7,675.31, less $500 standard deduction, taxable income, $7,175.31.

Q. (Mr. Pierson) And on that basis, what was the tax deficiency? A. The tax deficiency was $1,041.58, and allowing taxes withheld of $179.10, making it a net deficiency of $862.48.

Q. At that time were there any returns prepared by anyone other than you with reference to this taxation? A. No, there were not.

(Mr. Pierson) Witness with you.

(Mr. Mundy) No questions.

(Mr. Pierson) That is all.

(Witness excused.)

(Mr. Pierson) That is the Government's case, Your Honor.

(Mr. Mundy) May we respectfully move for judgment of acquittal, Your Honor?

(The Court) That is denied.

AROLD H. RIPPERGER,

the defendant, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Mundy:

* * * * * *

(St. Tr. 26-56):

Q. During the year 1950 you were employed or had work in connection with St. Thomas Episcopal Church? A. That is correct.

Q. And a W-2 was filed by the Church for that year. You know that is correct? A. I know that is correct, yes.

Q. Showing wages earned of $1285? A That is correct.

Q. And income taxes withheld of $96.40. A. Whatever the form shows yes.

Q. And for the year 1951 you were employed by the same Church, St. Thomas Episcopal Church, and you earned that year $1320; is that right? A. That would be right.

Q And withholding tax of $108; is that correct? A. Yes

Q. And, for the year 1952 you were employed by the Eastern Woodwork Corporation and you had earnings of $800; is that correct? A. That is correct.

Q. And taxes withheld of $164? A. That is correct, upon my direction.

Q. Would you kindly explain how you happened to be employed by the Eastern Woodwork Corporation? A. Eastern Woodwork was a closely held corporation for which I had been counsel, officer and director since 1947, I think.

The guiding light of the corporation suffered a heart attack over in Washington on a particular Thursday, which took him off extensively, and the Board at that time constituted the president, who had had the heart attack, a chap who was the bookkeeper and office manager, and myself, and there was in the making a Government contract.

I had been named the Executor under the president's will, and it was imperative that this not be dropped. I took it upon myself to declare a meeting of the Board of Directors, and nominated myself as president, and one of the top foremen in the shop as vice-president, and the other member stayed as he was.

The salary that I immediately set up for myself because I knew that it was going to be a full-time proposition, and I immediately arranged that all phone calls from my law office be transferred to the office of Eastern Woodworking, and I actually maintained my office there, five or six days a week, whatever it demanded.

The only time that I was absent from that position was that I had one case that came up in the Court of Appeals, and I had to be off for that.

Q. Now, to interrupt you, who issued the order on behalf of Eastern Woodworking Corporation that a W-2 be filed for you? A. I issued it. I issued it. The bookkeeper asked me whether or not that was to be a legal fee, and I said, "No, sir. The business of legal fees would be discussed when the business was solidified."

We had too many other things to do, and in the meantime I would take a salary of one hundred dollars a week from which he should deduct such things as withholding and social security taxes.

He made a remark, "Well, that's going to take quite a bite out of your one hundred dollars a week."

I said, "That's the way it's going to be."

Q. Now, I would like to pass to another point. In your statement offered in evidence on behalf of the Government, dated November 18th, 1955, you were asked this question:

"During the period in which you worked for these various churches, did the pastor or someone in authority give you a W-2 for your earnings?"

Your answer was: "All except the complete period at St. Thomas. I would say it was at the very beginning of my retention there they adopted the attitude that they weren't going to make any withholding. In all other cases they did, and I have the W-2's."

Do you have any comment on your answer? A. Yes, I do.

Q. Was the answer correct or not? A. Not completely.

Q. W-2's were, in fact, filed by St. Thomas for you, were they not. A. Yes, they were.

Q. When you gave this statement, did you have any records in your possession in the offices of the Agent? A. No, sir.

Q. You received a letter from Internal Revenue a day or two before this statement was taken; is that correct? A. I think I received the letter on the fifteenth.

Q. And you went to the office of the Internal Revenue, I suppose Intelligence Division, and before leaving that date a statement was taken from you; is that correct? A. That's correct.

Q. Now, passing on to other years, in 1953, you were employed by St. Thomas Church and you earned $800; is that correct? A. That's correct.

Q. And no tax was withheld that year? A. Well, if the record shows not. That was the confusion in the statement, if I may explain that.

Q. In other words, when you said that W-2's were not filed, what you meant to say was that for a certain period, St. Thomas did not withhold any tax; is that correct? A. That is correct because the Reverend Lynch, who was then the rector said that they were not going to do it but they would file a year-end return, and I told them, I made some remark, that I wish they did, but that I was not going to be one to tell the church how to run its business.

Q. During the year 1953 you were also connected with the Church of the Incarnation? A. That is correct.

Q. And you had earnings there of $666.68 for that year; is that correct? A. I think that is about correct.

Q. And taxes withheld of $88.40? A. I think so.

Q. And in 1954 you were connected also with the Church of the Incarnation and you had earnings of $1603; is that correct? A. That is correct.

Q. And taxes withheld of $179.10. A. That's correct.

(Mr. Mundy) We would like to offer in evidence the W-2 forms just referred to by the witness. I think they are for the years that the witness has referred to.

(The Clerk) W-2 Forms, Defendant's Exhibit 1.

(W-2 Forms for years 1950 to 1954 were marked Defendant's Exhibit 1.)

Q. (Mr. Mundy) You referred to a communication from the Internal Revenue Service to you in 1955 preceding the date upon which the statement was taken. Is that the letter that you had in mind? A. That's correct, sir.

Q. That is the letter from the Internal Revenue to you dated November 14th, 1955? A. That is right.

Q. Did you also receive a letter from Mr. Greenland Intelligence Division, dated June 4th, 1956? A. Yes, I did.

Q. Is that the letter? A. That is the letter, yes.

Q. Did you also receive a letter from the Internal Revenue Service, Regional Office, Philadelphia, dated August 17th, 1956? A. Yes, sir, and that is the letter.

(Mr. Mundy) May it please the Court, we offer in evidence the letters referred to by the witness, that is the letter of November 14th, 1955, the letter of June 4th, 1956 and the one of August 17th, 1956.

(The Clerk) Defendant's Exhibit 2-A, 2-B, and 2-C.

(Letters above referred to from Internal Revenue to Defendant were marked Defendant's Exhibits 2-A, 2-B, and 2-C.)

(The Court) May I see them?

Q. (Mr. Mundy) During the years in question, Mr. Ripperger, what was your understanding of what happened to the W-2's that were filed by an employer for an employee? A. Well, other than the fact that they went to the District Office where I should file my returns and pay my taxes, nothing; that's all. I didn't know anything about the precedure.

Q. Wasn't there a conference set up at the Baltimore Office for you? A. You mean other than the one in November of 1955?

Q. Yes. A. That is right, sir. There was the June 14th letter of 1956.

Q. What happened with reference to that conference? A. Well, I had the letter, and there was a similar letter addressed to my wife.

Q. That was June 1956? A. I think it was '56.

(The Court) One of the letters which you offered in evidence, Mr. Mundy, was a letter of June 4th.

(The Witness) June 4th, 1956.

(The Court) Giving him an opportunity to come in with counsel in view of the fact that criminal proceedings were being considered.

(Mr. Mundy) Thank you, Your Honor.

(The Witness) These came by registered mail, one to my wife and one to me, and when I got to the office that morning, I immediately called Mr. Haspert, and I suggested that on June 11th, which was the time designated in the letter that I had an engagement with the client.

I don't recall whether I had a trip to Washington — I think it was — because I had a client who has been engaged on some contract work, and that thing had been going on for several years, and it looked like we were about to make some progress, and I asked Mr. Haspert at that time, two things.

First of all, would it not be possible to postpone or get another date other than June the 11th; and secondly, generally what their attitude was what I would have to have by way of new evidence.

And Mr. Haspert at that time sort of agreed tentatively on June 18th, which was the following week because the rest of the week he had some things to do, or the gentleman with whom he would have had to do anything with me was occupied, and he said, "Tentatively, let's put it down for June 18th."

And I asked him why there was any suggestion of criminal liability on the part of my wife because I had never been under the impression that I was responsible criminally although since the investigation got under way I was made aware of it, although I never had any idea in my own mind, but certainly there was no reason why Mrs. Ripperger should be involved.

Q. And you set another date for a subsequent conference? A. That is correct.

Q. And the other date was June 18th? A. That is correct.

Q. Did Mr. Haspert agree to that? A. He agreed, I understood he agreed to the postponement because we agreed on the telephone on a tentative date of June 18th.

Q. Did you have a conference on June 18th? A. No, we did not.

Q. Tell us why not. A. Well, it was either later the same day that I talked with Mr. Haspert or the next day —I forget which — he called and I was not in the office, and he said, left word that it was not necessary for me to come over, that we weren't going to have the conference.

My secretary took the message, and that was that.

I called Mr. Haspert and asked him what happened, and he said, Well, I had indicated I had no new evidence, but I certainly wanted to avail myself of all opportunity because this was a very serious thing, and he said, well, they had decided it was not necessary, and the matter then would be referred to Philadelphia, and I would have an opportunity to go to Philadelphia and discuss the problem with the Regional Office.

So that letter was — I mean that June 18th appointment was canceled, and there never was any other scheduled.

Q. Now, these conferences at the Regional Office in Philadelphia, as I understand it, are on the record as being prepared by the Local Office; is that your understanding? A. I was so advised by the gentleman who interviewed me there.

Q. I show you a memorandum of a telphone call, dated June 11th without the year, and ask you what that is. A. That is the secretary — that is a telephone message from my secretary to me, which the initials "AHR" are mine, from Mr. Haspert with the remark that it won't be necessary to keep appointment next Monday. That was the ap-

pointment that had been scheduled after I received this June 4th, 1956 letter.

(Mr. Mundy) May it please the Court, we offer in evidence the memorandum dated June 11th.

(The Witness) The initial M is in regard to the secretary's name, which is Barbara Ann Matter.

(The Clerk) Defendant's Exhibit 3.

(Memo, telephone call dated June 11th was marked Defendant's Exhibit No. 3.)

Q (Mr. Mundy) Mr. Ripperger, what was the nature of your law practice? A. It was general practice.

Q. Did you specialize in any particular type of law? A. No, sir, I have a particular fondness, but I never specialized in anything.

Q. Did you do real estate work? A. I did real estate work. I prepared some wills. I tried negligence cases, contract cases on both sides of the fence, so to speak; prepared some wills; administered or helped administer some estates, and I did a few tax returns, I guess, over a period of years, they would average about five or six, once a year.

Q. During the years 1949 through 1954, while you were in the practice of law, did you have a secretary of your own? A. In the latter part of it — I don't know the exact years, sir — I had a sister who was employed at a law office in town, and she would do some of my work for me at home, for which I reimbursed her direct, but I had no full-time secretary, no, sir.

Q. Who did your secretarial work? A. I did.

Q. You did? A. Yes.

Q. Your overhead item figure seemed to run about three hundred and fifty dollars a year. A. Well, that is about right, such things as transportation where I would use my automobile, my wife's automobile, actually, for business. I never kept a record of that.

Q. You had stationery, telephone. A. Yes, things like that, that's correct.

Q. According to my information during the year 1949 you earned approximately $3900. Would that be about right? A. Yes, that's about right.

Q. Then during the year 1950 you earned about $3300 or $3400? A. I think that is right, yes, sir.

Q. In 1951 you earned approximately $5300? A. I think that's right.

Q. In 1952 you earned approximately $9,000? A. Yes.

Q. These are gross figures. In 1953 you earned about $6,694; is that correct? A. Yes.

Q. And in 1954, you earned a gross of $7,175.31.

(The Court) Well, that has turned out to be net.

(Mr. Mundy) Yes.

(The Court) Or gross after expenses. The total gross was $8,376, and business expenses were $500, is what made it $7,175.

Q. (Mr. Mundy) Now, during all the years 1949 through 1954, W-2's were filed for you; is that correct? A. That is correct.

Q. And in order to reconstruct your income, was it necessary for you to go through all your old files? A. It was, yes, and I did.

Q. You had some of them at home; is that correct? A. Frankly, all of my old files except those that had some continuity to them year to year were at home. I kept them stored in my attic, and some of them I had in boxes in my barn.

Q. Was it necessary for you to spend much time in reconstructing your income for the years 1949 to 1954? A. I would say total-wise about thirty hours, I guess. It seemed longer than that because it was not all done at

once, but I think if you boil it down it was about thirty hours.

What happened was that I simply went through the files, and had the columnar sheet which you have there, I marked down columns for five years.

I had a column for '50 to '54, and my records for 1949 were in a book, which I gave to Mr. Haspert, and I don't know whether he verified this with my clients or not, but I think I gave him the '49 files, but the five years, '52, '53, '54, I made those up by going through the files.

(The Court) You didn't keep a cash book?

(The Witness) No, sir.

Q. Mr. Mundy) After you returned from the Navy, did you and your wife take a vaction? A. In 1948 we took a vacation. That cost us about sixty dollars for one week.

Q. That was in 1948? A. Yes.

Q. Did you have any other vacation? A. In 1952 we went up to New York for two days.

Q. To New York for two days? A. Two days.

Q. Any other vacation? A. And there was one year — I forget — I think it was '53 or '54, my wife went to go visit one of her relatives out in Illinois, and we drove out there and stayed with them for a week. We had no expenses particularly. We drove out and stayed with them.

Q. What year was your last child born? A. We had the third daughter in January 1951, and we lost a boy at birth in November 1951.

Q. The daughter was born in the early part of 1951, and that daughter is still living; is that correct? A. That's correct.

Q. And you lost another child at birth in the latter part of the same year, is that correct? A. November 19th.

Q. What sort of work did your wife do during the time she was employed? A. She was secretary to her father's business, that is, awnings, shades, and venetian blinds.

Q. Who would take care of the children while she was working? A. We had a housekeeper that watched them for part of the time, and my wife paid her out of what my father-in-law paid my wife, whatever that was, and then for some time when there was no housekeeper available, she would have the children with her down at the shop.

(Mr. Mundy) May we have just a moment, Your Honor?

(The Court) Yes.

Q. (Mr. Mundy) I show you a monthly bank balance with your name on it, Fidelity-Baltimore National Bank for the period January 30th, 1953 to April 30th of 1955. Maybe you are not familiar with it. Are you? A. Let me take a look at it.

(Mr. Mundy) May it please the Court, I offer in evidence the paper that I have just mentioned by way of stipulation. It shows monthly bank balances, may it please Your Honor.

(The Court) What sort of account was that?

(The Witness) It's an attorney's account.

(Mr. Mundy) His Honor asked what sort of account it was. This is an account that was in the Fidelity-Baltimore National Bank.

Q. (Mr. Mundy) Is that correct? A. That's correct.

Q. And it is called an attorney's account; is that correct? A. Yes.

Q. Was that the only attorney's account that you had? A. That's the only account I had in my own name.

Q. That's the only account you had in your own name? A. Yes.

Q. Now, for the years covered by the information, I notice, just to take a few at random, that in January your balance was $944.12. In February—

I will hand this to Your Honor in a moment.

In February $483. July is the highest figure, $1,514.24, and possibly December is the lowest figure, $129.

Did you ever keep any substantial amount of money in this account? A. Well, it depends on collections. I mean sometimes the collections from clients were a substantial amount. I have had better than $10,000 go through the account on real estate.

Q. I am sorry. Perhaps my question was phrased badly. Did you ever have any substantial amount of your own money in this account? A. I guess I did, at one point or another. I would have to look through that and say when I did and when I didn't. At some times I did, but I don't know exactly when those times were.

Q. Well, do you ever maintain as a regular thing a large amount of your own money in this Fidelity-Baltimore National Bank account? A. No, sir, I did not.

Q. Well, what would be the average of your own money in this account? Was it $50, a hundred, two hundred, or how much? A. It might be about two hundred or three hundred. That's on the average.

Q. And much of the money that went into this attorney's account was client's money; is that correct? A. That is correct.

(The Clerk) Defendant's Exhibit 4.

(Monthly bank balances, attorney's account, was marked Defendant's Exhibit 4.)

(The Witness) May I add to that that that was a special checking account and not a regular bank balance, not a regular checking account. That's an account where you buy books at so much for twenty checks, and I never had a regular checking account because I never could count consistently on having enough.

(The Court) This is a special checking account?

(The Witness) That's correct. I just figured that that was cheaper than having to pay bank charges for not having the minimum balance that would be required from time to time.

Q. (Mr. Mundy) Did you have any annual retainers from your law practice? A. One.

Q. That was Eastern Woodworking? A. Eastern Woodworking. That was three hundred dollars a year, which didn't have any specific time for payment.

Q. Is that the only regular money which you had coming in? A. That, and the church.

Q. And the church? A. Yes.

Q. It is admitted by you, as I understand it, that you filed no returns for the years 1949 through 1954; is that correct? A. That is correct.

Q. And it is my understanding that the last return you filed was for the year 1948, filed in 1949; is that correct? A. That is right.

Q. Now, recently, while you have not filed returns, you have paid the taxes, exclusive of interest and penalties, for the years 1949 through 1956; is that correct? A. That is correct.

(Mr. Mundy) We offer in evidence, may it please the Court, a letter from Mr. Sharretts to the Director of Internal Revenue, dated April 19, 1957.

(The Clerk) Defendant's Exhibit 5.

(Copy of letter, Sharretts to Director of Internal Revenue, April 19, 1957 was marked Defendant's Exhibit 5.)

Q. (Mr. Mundy) I believe the total taxes paid on that letter, the total taxes according to that letter of April 17th, 1957 was about $4700. Now, I ask you whether it was necessary for you to borrow that money — I don't want the name of the person you borrowed it from — but my question is whether it was necessary for you to borrow that money? A. Yes, it was.

Q. Why didn't you file income tax returns for the years 1949 through 1954? A. Because I was under the impression that when — from reading the instructions, that when the returns were filed, the taxes had to be paid.

It said so there, and there was an article in the paper, just a week or so ago that said the same thing, and I didn't have that money at the time to pay the taxes.

Q. I show you a booklet issued by the Internal Revenue called "Helpful Information on How to Prepare Your Income Tax Return on Form 1040 for 1956."

Now, will you please point out the part of that instruction which led you to believe that you had to pay your tax when you filed your return? A. The part which I have underscored there.

Q. Read that part, please. A. It is under the hearing "How to Pay."

"Any balance of tax shown to be due on line 18, page 1, of your return on Form 1040 must be paid with your return."

Then there is how to make the check payable.

(Mr. Mundy) We offer in evidence the form just referred to by the witness, designated "Publication III (Rev. 9-56.)"

(The Clerk) Defendant's Exhibit 6.

(Pamphlet "How to Prepare Income Tax Returns" was marked Defendant's Exhibit No. 6.)

By Mr. Mundy:

Q. Mr. Ripperger, on page 6 of the statement which you gave on November 18th, 1955, the question was asked:

"And because of lack of funds, you didn't file?

"Answer: That is the thing, sir. I have never adopted or expected that theory of obligations would apply under any circumstances."

Did you say "obligations" and if so, did you mean "obligations"? A No. I will answer it—

Q. Well, just specifically, what word did you mean? A. Limitations. I not only meant it, I said it.

Q. What word? A. Limitations. I said it.

Q. Did you have any intention of evading any income taxes for the years 1949 through 1954? A. Not for any year and not for any time.

(The Court) He is not charged with that.

I mean, he is not charged under 145(b).

(Mr. Mundy) All right. Well, of course, Your Honor, the reason I asked the question was under our theory it is pertinent. I know that the Government does not agree with us, but I thought I should get the factual situation. That was the reason.

Q. (Mr. Mundy) Did you have any intent to deceive the Collector as to the existence or extent of the tax liability? A. No, sir.

Q. For the years 1949 through 1954? A. No, I didn't.

Q. Did you intend to pay your income taxes for those years? A. I did whenever I had the money which I would make out of the practice of the law, for whatever the obligation was at that time, to go down and say "This is it." Which I did, and I have never been without that intention.

Q. Did you know during the years 1949 through 1954, through March or April the 15th, 1955, did you know that there was any criminal responsibility for not filing returns, income tax returns? A. No, I would say not.

Q. What kind of responsibility did you think you were under? A. Well, frankly, I never thought that I was under any specific kind of responsibility, except that I knew that I had to pay those taxes when I filed the return because the form says so, and undoubtedly there would be some interest or penalty charges.

I did not look at the law to familiarize myself with it. I never had that kind of practice tax-wise, and therefore I never acquainted myself with it.

Unfortunately I always practice law on the basis of acquainting myself with the problems which were at hand.

Q. As I understand your answer just made, you thought that you had to pay the taxes when you filed the return; is that correct? A. That is correct.

(The Court) Did you take a course in taxes at the University of Baltimore Law School?

(The Witness) No, Your Honor, I didn't.

(The Court) They didn't teach taxes there?

(The Witness) I think that at the time I was there, at the best it was an elective, we had — it was administrative law that we were given.

We did not have the course in taxation in my curriculum. I was in the Class of 1940, and the tax practice had not gotten to the point inasmuch as they were not included in the curriculum there.

I think that within that period they started their Master of Laws course. That is between '37 and '40, and the tax subject was included in the Master of Laws curriculum.

Now, in 1955, I think it was, when the 1954 Act came along, the Eastern College of Commerce had a Seminar at the Peabody Conservatory.

That was simply with regard to technical details. It had nothing to do with criminal sanctions or civil sanctions, and I did attend that course with Mr. John Farrell at the time we were associated.

(The Court) A seminar course where?

(The Witness) I think it was the Eastern College of Law, sponsored it, and it was an elective, and they held it at one of the halls in the Peabody Conservatory.

(The Court) How long did that course last?

(The Witness) It think it was about six weeks. It had relation strictly to business law, and there was no discussion of forms, sanctions, or anything of that sort.

Q. (Mr. Mundy) Was it a course in taxation? A. Well, it was designed just to emphasize—

Q. Not what it was designed for. What was it? A. It was a course in taxation, but it dealt only with changes in the 1954 Act, and it presumed a tremendous amount of information from the 1939 Act, which I did not have.

Q. Mr. Ripperger, withholding taxes are filed quarterly, are they not? I am getting back to your W-2's.

(The Court) You mean W-2's that somebody else filed?

(Mr. Mundy) Yes.

(The Court) On income paid to him?

(Mr. Mundy) Yes, by the employer, they are filed, as I understand it, annually.

Q. (Mr. Mundy) Is that correct? A. That is correct.

(Mr. Pierson) Yes.

Q. (Mr. Mundy) And the taxes withheld are filed quarterly? A. I understand that, yes.

Q. And the taxes withheld are paid by the employer to the Director of Internal Revenue? A. That is correct.

Q. During the years 1949 to 1954, were you of the opinion that there was an account set up in your name in the Collector's Office as a result of filing your W-2's? A. Just an opinion, yes.

Q. What is the answer? A. Yes.

(Mr. Mundy) Witness with you.

CROSS EXAMINATION

By Mr. Pierson:

Q. It is true, Mr. Ripperger, that you told Agent Haspert that you had no additional evidence to submit? A. I said that I wouldn't know what I could do by way of additional evidence because in the very first instance and in the ensuing conferences that Mr. Haspert and Mr. Wheeler had with me, that I thought I had said everything that I had to say.

Q. You told them the whole story? A. I figured that I had, but at the same time I also told Mr. Haspert that I didn't want to foreclose any right which I would have because this was a very serious matter, and my livelihood at the Bar, for whatever it is worth, was at stake, and I didn't want to lose it.

Q. Now, you said you got a book for 1949? A. Through.

Q. For the years? A. That's right. Mr. Haspert had that book. My files were in such order reasonably that there was not too much doubt as to my income. That is, I would say it this way: To me there was no doubt that I could go through it, as I did within thirty hours, and somebody who is unfamiliar with my system probably would have taken longer. But the evidence was there that I had collected fees that I had earned at so much money.

It was also reflected, or would be reflected in the check book, you could see what transactions I had collected, and what I had paid out, so there wasn't any confusion or there wasn't anything hidden.

(The Court) Do I understand that in your account there that you deposited all fees that you received in your bank account?

(The Witness) Yes. As I said, I was asked that by Mr. Haspert and Mr. Wheeler.

(The Court) Including cash fees that you received?

(The Witness) I said practically all, Your Honor. I tried — I never had enough to do it consistently, but I tried to get a weekly draw-off of thirty or forty dollars, and occasionally a client would pay me on Friday, when I would draw it, and if the check book was seventy-five dollars, I would deposit twenty-five dollars as cash, and I would have fifty dollars for living expenses for the week.

That did not happen, I would say, any more than ten percent of the times. So that to answer your question, all money which I got as fees went into that banking account, yes, sir.

(The Court) Are those books here?

(The Witness) They were available to Mr. Haspert, and he returned them to me, the check books.

May I just explain something about reconstructing the income?

When I had this interview on November 18th, 1955, with Mr. Carney, and Mr. Haspert was there, he had very little to say. Practically all the questions were by Mr. Carney, and at the conclusion of that, I said to Mr. Carney, "Well, now, am I supposed to stop the practice of law, as this is a serious thing that you are attempting to charge me? Am I supposed to stop the practice of law?"

He said, "No, go on as you are, but we would like you to help reconstruct the information and get it to us as quickly as possible", and I said I would be delighted to do that.

So these sheets which Mr. Haspert put in here, as I said before, I made up, by going through my files, and the holiday came in, Thanksgiving Holiday came in, and Christmas Holiday came in, and I had about half of my work done. I guess about seven or eight of those pages were completed, and around February, Mr. Haspert called me one day and said could he have some of the files on which I had worked.

I said I would be delighted. My car was down in front, and we could go out, and he said, "No, come and go in my car", which was very nice. So he and Mr. Wheeler and I went out to my home.

I called my wife before hand to let her know that we were coming because she does not like me to bring people in if she thinks the house is untidy.

I had three or four boxes of files down in my dining room, and I went upstairs to the attic and got the rest of my files, and they were not all of the files which had been worked on at that time, and I asked the gentlemen did they want me to get each individual file, and their answer was no.

And then as I continued to bring the files up to date, some of them I took down, but again not all of them, and I took the sheets over daily or every other day, and it was at that time in February, I think it was, when the gentlemen went to the house, it was at that time that I gave them my check books, or around about that time, after I had gone through it.

And then some months after they were completed, they had completed their part of the work, Mr. Haspert and Mr Wheeler, or another gentleman brought the boxes over to my office.

Q. (Mr. Pierson) That is how you reconstructed it from the files? A. That is correct. It was there.

Q. Then from 1949 to 1954 you had not prepared returns for those years? A. No, but I had the information where I could get to it.

Q. You were going to? A. In 1949 -- now, I will say this — in 1949 I had a return prepared.

Q. You did have a return? A. Yes, sir, but I looked for it and I cannot find it. I made that remark to Mr. Haspert and Mr. Wheeler, I think. Now, I don't know if I had a typed copy which I gave them.

I may have. I looked for it — I cannot — I have a file which shows work sheets and everything like that.

Q. So in '49 when you prepared this return, you did know what your tax liability was, but from '50 through '54 inclusive you did not know what your tax liability would be? A. Well, I didn't know to the nickel, Mr. Pierson, but I had an idea.

Q. You had an approximation? A. I had an approximation, yes, but it was such that these fees which came to me from time to time were never enough that I could pay the whole thing off at once.

(The Court) Why didn't you file a quarterly withholding or pay it quarterly?

(The Witness) Quarterly withholding?

(The Court) Yes, I mean the estimated return.

(The Witness) Well, because I didn't have the money, sir, and I thought you had to pay the money when you had the return, but I have since learned it is different, but when I learned that, that's when I got that letter, and talked to somebody about it.

(The Court) You say you never had the money to pay it all at once, but the law does not contemplate that you pay it all at once. The law contemplates that you pay it quarterly.

(The Witness) Well, I did not understand the law in that fashion.

(The Court) You didn't understand about quarterly estimated returns?

(The Witness) No.

(The Court) You made out returns for other people and didn't understand what the quarterly estimated returns were?

(The Witness) That is right, sir.

Q. (Mr. Pierson) You did tell Mr. Haspert, though, that you knew you could have filed without paying? A. I didn't. My recollection is that I didn't say it like that. My recollection is that I said I know it now, at the time this thing, these things came up, I didn't know it.

I may have just said it in that fashion, but that is not the intention of it.

(Mr. Pierson) That is all.

(Mr. Mundy) Step down, Mr. Ripperger. That is all.

* * * * * *

(S. Tr. 64-68):

(The Court) I don't think it is necessary for me to hear from the Government at this time.

As counsel know I went over part of this ground very recently in the Jones case, at which time I read the Spies case and Murdock and many of the other cases. I have read everything that was in the defendant's brief and I have read all the material parts of the opinions and charges that have been handed up to me.

After I received the defendant's brief on Saturday I read it and gave more thought to it and read the Spies case again, the Yarborough case and the Murdock case, and re-read the Murdock case as recently as lunch time in order to be sure I had it clearly in mind.

I make the following findings of fact:

The failure to file the return for both years was voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent.

I find that the defendant knew that the returns ought to have been filed and that he deliberately failed to file them so that the Government would not know the extent of his income and of his tax liability.

Whether it is necessary that there be an actual tax liability need not be decided in this case since it is admitted

that there was such a liability for both the years in question.

Spies v. United States indicates that an actual tax liability is not necessary if the tax return was due under the terms of the law in order to support a prosecution under 145(a) and 7203, and in appropriate cases the language of the charge would vary.

I do not mean to say that every word said in the Yarborough would apply to every case in the future; but I am making the point that the charge must be based on the facts in a particular case, as this case must be based on the facts in this case.

I find that the failure to file was without justifiable excuse. It is not necessary for the Government to prove in a case under Section 145(a) or 7203 that the defendant intended or attempted to evade or defeat the payment of taxes permanently.

I do not think it is necessary for the Government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes indefinitely or at all; but if the Government did have such a burden I find that it was met in this case.

That is a natural inference from the evidence in this case and no other motive or purpose has been suggested.

The reason why the defendant did not file his tax returns, namely, that he did not have the money to pay the taxes is not a legal excuse, as has been held in many cases. I find as a fact that the defendant knew that he had to file a return whether or not he paid the tax, and he knew that he could and should pay the estimated tax quarterly in advance. The defendant says that he relied on the language in the instructions.

The form offered in evidence was for the year 1956. I suppose similar language appeared in other instructions.

"Any balance of tax shown to be due on Line 18 Page 1 of your return on Form 1040 must be paid with your return."

He also said that he did not know that he was obligated to file the estimated returns and did not know that he could and should make quarterly payments. I find it incredible that a man could have read the returns and instructions closely enough to find the portion quoted above and yet not have discovered even from looking at the return itself that it contemplated quarterly payments in advance of the estimated tax; so that I don't find that was the reason he did not file his returns, especially since the defendant as a part of his general practice made out tax returns — perhaps in not very great numbers — for other persons, and had included in his practice some fiduciary duties, as was described by Mr. Bregel and by the defendant.

Accordingly, despite the fact that I recognize that the Government has a heavy burden in proving such a case as this, it has proved beyond a reasonable doubt that the failure to file the returns was willful.

Despite the fact that I have given close attention to any other explanation of defendant's conduct from the evidence which would not amount to willfulness, I am bound to find in this case that the defendant was obligated to file the returns, that he did not file them, and that such failure to file was willful within the meaning of Section 145(a) where it applies, and with respect to Section 7203 where it applies.

I therefore must find the defendant guilty on both counts.

If the defendant intends to take an appeal I will go over this more carefully and consider whether it is necessary to amplify the findings, and I will look over your requests for instructions; but I have read them and I have given effect to some of them, and with respect to the burden of proof I have made clear what the Government must prove.

I do not think that you can pull individual phrases out of an opinion, as some of your requests for instructions do,

and pin down the burden on the Government in this case to prove one particular element or one particular way of proving wilfulness and say that they must prove that when they may have proved other alternative avenues of reaching the same conclusion.

So the verdict must be guilty on both counts.

SENTENCE

(The Court) This Court has no jurisdiction over that general practice in the State of Maryland. The Court will file an order to show cause why he should not be disbarred from the practice of law in this Court, which I would not undertake to dispose of myself, but that will be heard by at least two Judges. There are precedents, of course, which the Court is aware of, as counsel for the defendant are aware of, in the State of Maryland. The Court has those in mind, but it is not for this Court to dictate to any other Court, although the Court should take into account the probable consequences in fixing punishment.

I have read Dr. Guttmacher's report, and I think it explains clearly the background that I have not had up to this time.

In view of Dr. Guttmacher's report, and the great confidence that I have in Dr. Guttmacher; the fact that it appears to be a thorough report covering all of the aspects, this Court does not feel that it is necessary to have any further medical examination. The Court does not feel that it is necessary to have any Probation report.

I accept everything that the character witnesses have said here today. There is nothing which a Probation report would show more favorable to the defendant than has been brought out by these character witnesses, who know him better than a Probation Officer could in such a short time, whose obvious sincerity convinces the Court of the regard in which the defendant is held in the community.

The hardest thing that any Judge has to do is to impose a sentence where the sentence falls more heavily upon the family than it does on the defendant.

I have thought about this case a great deal during the past week. It is even harder when the family includes people whom you have known for many years, for whom you have great respect, and makes the knowledge of the effect of the punishment more personal, although probably no more real than in other cases.

I agree with Mr. Mundy that there are various classes of fault in the non-filing cases, and that this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away.

On the other hand, it was, as I found, a deliberate and wilful failure to file which started for the reason very clearly set out in Dr. Guttmacher's report, which is inappropriate to refer to further except that, of course, counsel have read it.

They are not extenuating circumstances. They do show that it is not one of the more serious cases.

Mr. Mundy referred to the different elements that a Judge must take into account in determining what is to be the punishment in the case. He mentioned what he called the vengeance motive. I hope it is not necessary for me to say that I have no such personal feeling, and I don't think that that is an element which society has sufficient interest in to require the Court to give it any effect in this case.

In all of these income tax cases, a very important element is the one which Mr. Mundy mentioned, the deterrent effect upon others. The whole administration of the income tax law depends upon people filing returns and filing honest returns.

We do not have a group of Internal Revenue Agents coming into our house every year and going through our papers and questioning what we have been doing.

The Government relies upon its citizens to make returns when they should make returns and to make honest returns.

They are checked for the protection of all the people who are earning money and paying their taxes. They are checked on the basis that we all know, a certain number of returns or a certain percentage of returns in different classes of cases are checked.

But the system, as the Supreme Court has said, relies upon the performance of this important duty of citizenship by each person.

Now, no one knows that better than a lawyer. No one is or should be more conscious of that duty and the reason for it than a lawyer.

There are many people who do not like to pay income taxes. There are many people who would not pay taxes nor file returns if they did not fear punishment. I think we all know that, and in many cases, unfortunately in most cases, the only real punishment that can be given is some term of imprisonment because usually the person either hasn't saved any money, and is not going to be able to pay a fine or pay the taxes, and if somebody lends him the money to pay the fine, somebody else is paying the penalty for the person, or they have sufficient amount of money that the payment of the fine in addition to what they have withheld doesn't amount to anything.

Now, I am very conscious that the additional penalty which a lawyer must or may suffer, as Mr. Mundy referred to, is something that ought to be taken into account to him in all fairness, but the income tax laws apply to business men and lawyers equally, but if business men are to be sent to jail for the failure to pay income taxes, as this Court has pretty regularly done, unless there were exceptional circumstances, a decent respect for the administration of justice means that the courts cannot treat differently the lawyers whom they know, on the one hand and the business man whom they do not know on the other hand

If that were done it would destroy the respect of the citizens for the courts.

Because of the fact that the punishment for a lawyer is greater than the punishment for other men, and because the fact that this is not one of the most serious types of cases the Court will make the sentence as short as any sentence I have ever given in one of these cases, namely, three months.

I feel also that the financial penalties that come to a lawyer make it proper not to put any further additional financial burden on the defendant and on his family. So I will not impose any fine in this case.

Mr. Ripperger, will you stand?

JUDGMENT APPEALED FROM

The sentence of the Court on each count is that you be committed to the custody of the Attorney General for confinement in such place as he deems proper for a period of three months.

The sentence is in each count to run concurrent, there being no fine imposed.

(Mr. Mundy) Your Honor, may I take up just another moment?

(The Court) Yes.

(Mr. Mundy) First off, Your Honor, I want to thank Your Honor for a very fair trial that we had here a week ago.

I might say, Your Honor, that an appeal will be taken. Would Your Honor care to fix bail pending appeal at this time? I suppose the bail on which this young man is out now expired with his appearance in Court today.

I know Your Honor is familiar with Rule 46(f) which was changed, I believe, in June of last year, now liberalizing the Rule as to bail pending appeal.

(The Court) I understand that in order to deny bail pending appeal the Court has to find that there is no substantial point.

(Mr. Mundy) I think the Court has to find that the appeal would be frivolous.

(The Court) The Court did not arrive at the verdict without giving every consideration to all the questions which were presented very ably by counsel for the defendant both on the facts and the law, but I certainly would not undertake to say that any point urged by counsel for whom I have such great respect was a frivolous point. For that and for other reasons I do not find the point to be a frivolous point.

Therefore, the Court will admit the defendant to bail pending appeal, particularly since the sentence would be served substantially before the appeal could be heard.

Can you agree upon the amount of the bail, or do you want the Court to fix it? Of course, the Court has to fix it, but I will be glad to hear your recommendations.

(Mr. Pierson) I think $5,000 would be a proper bail.

(The Court) Mr. Mundy, that is the figure that the Court had in mind.

(Mr. Mundy) Your Honor, we won't demur to that. Of course, if we run into any difficulties we can confer with the United States Attorney or come to Your Honor, but we will try to make that.

(The Court) I will sign an order fixing bail as soon as the appeal is entered. There should not be, of course, any delay. It should be entered promptly. I will sign the order after the appeal has been entered.

(Mr. Mundy) Your Honor, at some time may we confer with the United States Attorney and with Your Honor as

to the rulings on our requests for instructions. I don't want to be too tedious this morning, Your Honor, but I think that in the oral opinion which you delivered last Monday you said you might—

(The Court) Well, I would like to hear right now what you have in mind, what points you felt were not covered by the opinion.

(Mr. Mundy) I am not really sure, Your Honor.

(The Court) Well, look them over and let me know. I don't want to do anything that will prevent a decision on appeal on the merits in the case, but I think the case is not as tortuous as the requested instructions would indicate.

(Mr. Mundy) Thank you, sir.

(Mr. Pierson) Well, of course, they say the question of evil motive.

(The Court) Well, I think it is a question of assuming an evil motive must be found, what is the nature of the evil motive which must be found, and I found a motive which I felt met the test, and I don't want to get into semantics how evil evil must be in order to be evil motive.

I found that the motive which I stated in my opinion was a sufficient motive to satisfy that requirement, if such a requirement existed, and I stand by that ruling.

* * * * * *

GOVERNMENT'S EXHIBIT NO. 1

Testimony of Arold H. Ripperger Taken in the Office of the Intelligence Division, Internal Revenue Service, Baltimore, Maryland, on Friday, November 18, 1955, at 2:00 p.m., in the Matter of His Income Tax Liability to the United States.

Present: Arold H. Ripperger, taxpayer.

For the Government: Thomas B. Carney, Group Supervisor, Peter B. Haspert, Special Agent, Helen Swain, Reporter.

(Questions were asked by Group Supervisor, Thomas B. Carney, and answers were given by Mr. Ripperger.)

Q. Mr. Ripperger, it is customary to take these statements under oath. Are you willing to answer under oath? A. Yes sir.

Q. Do you solemnly swear that the answers you are about to give to questions asked will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes sir.

Q. Mr. Ripperger, it becomes my duty to advise you that under the Constitution of the United States you have the right to refuse to answer any questions or make any statement which may tend to incriminate you under the laws of the United States, and to inform you that anything you say, or any evidence which you produce at this hearing, may be used against you in any proceeding, criminal or otherwise, which hereafter may be undertaken by the United States. Do you fully understand this? A. Yes sir.

Q. Would you please state your full name. A. Arold Henry Ripperger.

Q. What is your age, sir? A. Thirty-five.

Q. Were you born in Baltimore? A. Yes sir.

Q. At what time? A. March 8, 1920.

Q. Are you married? A. Yes sir.

Q. When were you married? A. January 1, 1940. In Mount Vernon Methodist Church.

Q. What was your wife's maiden name? A. Harriet C. Barkingham.

Q. Do you have any children? A. Three daughters.

Q. What are their names and ages? A. Harriet B., aged 14; Priscilla D., 12; and Deborah L., will be 5 in January.

Q. Where did you attend primary school? A. Do you want the numbers?

Q. Public School? A. Public Schools of Baltimore City.

Q. High School? A. Baltimore City College. Graduated in 1937 in June.

Q. Did you attend college? A. No sir.

Q. Did you attend law school? A. University of Baltimore Law School. Graduated in June 1940.

Q. Are you a member of the bar? A. Yes sir. The State of Maryland, Baltimore City, and Baltimore County Bars, but no bar associations.

Q. Do you have a card to practice before the Treasury Department? A. No sir, I don't.

Q. When were you admitted to the bar? A. I think it was September 1941.

Q. Have you been practicing law since that time? A. Not completely, sir, no.

Q. What have you done in the business field since 1941? A. In 1941 I was assistant underwriter in a public liability department at Maryland Casualty Company; in October of 1942, I took a position as an investigator in the rent control section of the Office of Price Administrations; immediately prior to that position, I was employed in the billing office for one month at the Western Electric Company, Point Breeze; in February 1942, I left the O. P. A. and became associated with the law firm of Rome, Rome & Hamburger, where I remained until July 31 — Wait a minute! I left the O. P. A. in February 1944, and I practiced law with Rome, Rome & Hamburger until July 31 of 1944, at which time I was inducted into the United States Navy and I served in the Navy; I think it was February 22, 1946 I was discharged.

Q. What were your duties in the Navy? A. Most of it was general duty. Specifically, from boot training I went to Chaplains' Training School, William and Mary College, Williamsburg, trained as Chaplain's Assistant. From that school I wasn't graduated, I was sent to Norfolk receiving

station where I spent approximately a month. Then I went to Camp Perry, Williamsburg, Virginia, where I spent approximately eight months — excuse me, that would be approximately five months. My duties there were clerical in nature, office work, making up — we had a utility and supply, they would say we would need twenty men and we would pull out the cards. From Camp Perry, I was sent for training at Rito Beach, Long Island, New York. I remained there three weeks, then went for further training to San Bruno, where we had training for a month, and then was sent to Japan where I worked for three weeks in a storage warehouse, and the balance of my time, up to discharge, which would be approximately three months, as Assistant to a Protestant Chaplain because there were two of us there.

Q. After your discharge from the Armed Services, would you describe your business activities from that time to date briefly? A. I would say I returned to the practice of law in March 1946, and since that time I have practiced with offices at 100 St. Paul Street until November 19, 1954; then I had my own office without any associate at 11 E. Lexington Street until January 31, 1955, since which time I have maintained my office at 503 Title Building, Baltimore 2, Maryland.

Q Since 1946 what have been your sources of income? A. From the practice of law and from positions in various churches as organist and choirmaster.

Q. Will you please name the churches for which you worked? A. St. Andrews Episcopal, formerly Chester and Preston Streets, now located on Loch Raven Boulevard just over the county line. That was until January 1949. In January 1949 until — I am not certain as to the exact date — it would be August or September of 1953, St. Thomas Episcopal Church, 31st Street and The Alemeda, and from that time until August or September of 1954 I was at the Cathedral Church of Incarnation, University Parkway and St. Paul Street. I have no position now.

Q. During the period for which you worked for these various churches, did the pastor or someone in authority give you a W-2 for your earnings? A. For all except the complete period at St. Thomas's. I would say it was at the very beginning of my retention there, they adopted the attitude that we weren't going to make any withholding. In all other cases, they did and I have the W-2's.

Q. Since 1946, has your wife been employed? A. Yes, Sturdifold Awning & Shade Company, Inc.; the present address is 2133 Maryland Avenue, Baltimore 18.

Q. What is the present condition of your health? A. My health is very good so far as I know.

Q. Have you ever received any gifts or inheritance since 1946? A. No sir.

Q. Mr. Ripperger, what was the last year you filed an income tax return? A. In 1949 for 1948.

Q. Did you file a return for the year 1950? A. No sir.

Q. For 1951? A. No sir.

Q. For 1952? A. No sir.

Q. For 1953? A. No sir

Q. For 1954? A. No sir.

Q. Did you ever file an estimated income tax return? A. No sir.

Q. Did you have sufficient income in the years 1949 to 1954, inclusive, to require the filing of a return? A. To require the filing of returns, and there would also be some tax liability.

Q. You feel there would be some income tax liability in those years? A. Yes.

Q. What is your reason for not filing for the years 1949 to 1954, inclusive? A. Mainly the fact that in the practice of law the work in my case has not been steady, and at the time when necessary to file returns and to pay the taxes,

I did not have the funds available for the payments, and I have been consistently looking for the development of the law practice to the point where I could clean up all of the obligations at once. The time in those years did not arrive according to my circumstances.

Q. Have you had any unusual expenditures, such as sickness? A. There have been no protracted instances. I had difficulty in 1951 when my fourth child was lost at birth. There again I wouldn't say that was an extensive amount.

Q. Have you ever assisted other taxpayers in the preparation of returns? A. Yes, I have.

Q. Frequently? A. Some cases almost annually; others, infrequently.

Q. During this time, did you think of your own problem of filing? A. Yes, I did, sir.

Q. And because of lack of funds you didn't file? A. That is the thing sir. I have never adopted or expected that theory of [limitations] would apply under any circumstances.

Q. In other words, it has always been your intention to file these returns and pay the tax? A. That is correct, sir. I might say that I have never run out on a bill in my life. As a matter of fact, I don't know in the period of years of law practice I have pleaded for anybody else the statute of limitations.

Q. Mr. Ripperger, it will be necessary for a special agent to compute your correct income for the years 1949 to 1954, inclusive. Would you be willing to turn over your books and records for examination? A. Absolutely.

Q. Would you be willing to make available to Mr. Haspert, your withholding earnings from that employment? A. That's right.

. . . . . .

DEFENDANT'S EXHIBIT 2-A

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Baltimore 2, Maryland

November 14, 1955

In Replying Refer To:
I:SJM:jb

Mr. Arold H. Ripperger
Attorney at Law
100 St. Paul Street
Baltimore 2, Maryland

In re: Income Tax Returns for Years
1952, 1953 and 1954.

Dear Mr. Ripperger:

The Internal Revenue Service for the Baltimore District has no record of individual or joint income tax returns having been filed by you for the years 1952, 1953 and 1954 that bear the name and address shown above. It is possible that you have filed returns for these years from another address, or your returns may have been filed with a District Director of Internal Revenue at a place other than Baltimore, Maryland.

In order to facilitate further search for your returns, it is requested that you please answer the questions on the reverse side of this letter and immediately mail it to this office.

Your prompt reply will be appreciated, and it is important that it be addressed to the Internal Revenue Service, 327 Calvert Building, Baltimore 2, Maryland.

Very truly yours,

C. I. FOX

Acting District Director

DEFENDANT'S EXHIBIT NO. 2-B

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Baltimore 2, Maryland
327 Calvert Building

June 4, 1956

Mr Arold H. Ripperger
Long Green Pike
Glen Arm, Maryland

Dear Sir:

The current investigation by the Intelligence Division of your income tax liability for the years 1949 to 1954, inclusive, is nearing completion.

Developments of the investigation indicate that you failed to file income tax returns during the years in question. Consideration is being given to a possible recommendation that criminal proceedings be instituted against you for your failure to file income tax returns for the years 1953 and 1954, inclusive.

In the circumstances, it is deemed appropriate to grant you a conference before final decision is made, at which time you may appear with counsel if you so desire or with any other person who may have knowledge of the facts in your case whom you wish to be present.

Accordingly, a conference has been set in this matter, to be held at 10:00 on Monday, June 11, 1956 at 327 Calvert Building, Baltimore, Maryland. You may at that time present any facts or evidence which you wish to have considered in connection with this matter.

You are requested to inform this office promptly whether it is your intention to appear for the proposed conference. It is important that your reply and any inquiries relating thereto should be addressed to District Director of Interna-

Revenue, Attention: Chief, Intelligence Division, 327 Calvert Building, Fayette and St. Paul Streets, Baltimore 2, Maryland.

Very truly yours,

HERMAN E. GREENLAND,
Herman E. Greenland,
Chief, Intelligence Division.

DEFENDANT'S EXHIBIT NO. 2-C

U. S. TREASURY DEPARTMENT
Internal Revenue Service
800 Widener Building

August 17, 1956.

CC:PHI:RC-E
LGW
PHI-531183

Arold H. Ripperger, Esquire
Long Green Road
Glen Arm, Maryland

Dear Mr. Ripperger:

Please be advised that this office is in receipt of reports recommending criminal prosecution against you for various violations of the Internal Revenue laws.

In accordance with the procedure established in this office, a conference has been scheduled for Monday, August 27, 1956 at 10:30 A.M. in order to permit you, if you so desire, to present any additional evidence or arguments which you feel this office should consider prior to reaching a decision herein. Please advise this office immediately whether or not you intend to take advantage of the above-scheduled conference.

It is important that any inquiry or reply be addressed to the attention of Attorney Leon G. Wigrizer, Internal Revenue Service, 800 Widener Building, Philadelphia 7, Pennsylvania. Telephone WAlnut 3-2400, extension 487.

Very truly yours,

(Signed) CECIL H. HAAS.

LGW

Cecil H Haas

Regional Counsel

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FILED
DEC 20 1957
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 679

AROLD H. RIPPERGER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Appendix to Appellant's Brief No. 7448 (filed in Court of Appeals, copies of which have been forwarded to the Supreme Court Justices. This Appendix contains all relevant and material testimony of government's witnesses and defendant, as well as Exhibits referred to herein.)

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Arold H. Ripperger prays that a Writ of Certiorari issue o review the Judgment entered in this case on October 21, 957, by the United States Court of Appeals for the Fourth ircuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for he Fourth Circuit is reported at F. 2d .[1]

The opinion of the United States District Court for the District of Maryland is set forth in Appellant's Appendix, pp. 33-36.[2]

[1] Appended to the Petition as Appendix A, is a copy of this *per uriam* opinion.

[2] References are to "Appendix to Appellant's Brief No. 7448", and will be cited herein as "(App.)."

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Fourth Circuit on October 21, 1957. An extension of time within which to file petition for writ of certiorari to and including December 20, 1957, was granted to defendant by Order of the Supreme Court dated November 20, 1957.

The jurisdiction of this court is invoked under Section 1254(1) of the Judicial Code; 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

There are several questions presented in this case which have not heretofore been ruled upon by the Supreme Court of the United States but which should be. In addition to such questions of first impression, there are additional questions presenting other special and important reasons for this court's review on writ of certiorari which will be set forth herein.

The prosecution of defendant in the District Court for the District of Maryland arose upon a criminal information being filed against defendant alleging willful failure to file income tax returns for the years 1953 and 1954, under Section 145(a), Internal Revenue Code of 1939; and Section 7203, Internal Revenue Code of 1954, respectively. Defendant entered a plea of not guilty and elected to be tried by the court without a jury. He was convicted on both counts of the criminal information and was sentenced to three months' imprisonment.

In the course of the investigation of his tax liability, defendant supplied the agents of the Internal Revenue Service with complete and accurate statements of his income received during the years involved; and also gave said agents a full statement under oath in which statement he

explained his reasons for not filing his income tax returns on time. Thereafter, and when the government's investigation was nearing completion, defendant was advised in writing by the Chief of the Intelligence Division of the Internal Revenue Service of his right to appear with counsel at the usual final conference which is held prior to the completion of the investigation by Internal Revenue Service, and is normally granted by the Intelligence Division to taxpayers in such cases. Defendant advised the Intelligence Division of his desire to appear at such final conference and a definite time therefor was set.

However, before such final conference was held, defendant was advised by the special agent of the Intelligence Division who was in the process of investigating defendant's tax liability, that the conference had been cancelled. No reason or explanation for such action was given to defendant.

Defendant was therefore denied the opportunity to appear at the conference arranged for him, as above set forth, with counsel prior to the completion of the investigation of his tax liability by the Intelligence Division of the Internal Revenue Service. Thereafter, the same special agent of the Intelligence Division who cancelled the conference granted to defendant by the Chief of the Intelligence Division, and who was the special agent who worked on defendant's investigation, made an affidavit that "he is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns. . . ." On the basis of said affidavit, the U. S. Attorney issued a criminal information resulting in the prosecution and conviction of defendant.

QUESTION NO. 1.

Was the denial by a special agent of the Intelligence Unit of Internal Revenue Service of the right of defendant to appear with counsel at the usual final conference which is held in the Intelligence Division of Internal Revenue Service prior to the completion of its investigation of defendant (at which time the Intelligence Unit was considering the recommendation for criminal prosecution of defendant) after said right to appear with counsel had been granted to defendant by the Chief of the Intelligence Unit, a denial of due process of law requiring a reversal of defendant's conviction?

QUESTION NO. 2.

Where a Special Agent of the Intelligence Unit of Internal Revenue Service, *prior to the completion of his investigation*, makes affidavit that "as a result of this investigation, he is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns . . .," and on the basis of which affidavit the U. S. Attorney issued a criminal information resulting in the prosecution and conviction of defendant, does such procedure in the Treasury Department constitute such flagrant disregard of rights of individuals and abuse of administrative procedure as to result in a denial of due process of law requiring a reversal of defendant's conviction?

QUESTION NO. 3.

Does the action of the Court of Appeals in adopting the Opinion of the District Court:

(a) Result in rendering a decision in conflict with the decision of another court of appeals on the same matter?

(b) Result in deciding an important question of federal law which has not been, but should be, settled by this Court?

(c) Result in deciding a federal question in a way in conflict with applicable decisions of this Court?

(d) Result in departing from the accepted and usual course of judicial proceedings, or so far sanctioning such a departure by a lower court as to call for an exercise of this Court's power of supervision?

The Petitioner maintains that all three questions, including all parts of Question No. 3, should be answered in the affirmative.

STATUTES INVOLVED

Sec. 145(a) (1939 Internal Revenue Code):

"Failure to file returns, submit information, or pay estimated tax or tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the cost of prosecution."

Sec. 145(b) (1939 Internal Revenue Code):

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax

imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 3401(e):

"NUMBER OF WITHHOLDING EXEMPTIONS CLAIMED. — For purposes of this chapter, the term 'number of withholding exemptions claimed' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero."

Sec. 3402(a) INCOME TAX COLLECTED AT SOURCE:

"REQUIREMENT OF WITHHOLDING. — Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection b(1)."

Sec. 3402(f):

"WITHOLDING EXEMPTIONS.—

"(1) IN GENERAL — An employee receiving wages shall on any day be entitled to the following withholding exemptions:

"(A) an exemption for himself;

"(B) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e)(1)

(relating to old age) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(C) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(d)(1) (relating to the blind), for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(D) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A), (B), or (C), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption; and

"(E) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit."

Sec. 3403. LIABILITY FOR TAX:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any payment."

Sec. 6011(b):

"IDENTIFICATION OF TAXPAYER. — The Secretary or his delegate is authorized to require such information with respect to persons subject to the taxes imposed

by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons."

Sec. 6051(a):

"REQUIREMENT. — Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of the remuneration paid by such person to such employee during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, on the day on which the last payment of remuneration is made, a written statement showing the following:

"(1) the name of such person,

"(2) the name of the employee (and his social security account number if wages as defined in section 3121(a) have been paid,

"(3) the total amount of wages as defined in section 3401(a),

"(4) the total amount deducted and withheld as tax under section 3402,

"(5) the total amount of wages as defined in section 3121(a), and

"(6) the total amount deducted and withheld as tax under section 3101.

In the case of compensation paid for service as a member of a uniformed service, the statement shall show, in lieu of the amount required to be shown by paragraph (5), the total amount of wages as defined in section 3121(a), computed in accordance with such section and section 3121(i)(2)."

Sec. 6051(c):

"ADDITIONAL REQUIREMENTS. — The statements required to be furnished pursuant to this section in respect of any remuneration shall be furnished at such

other times, shall contain such other information, and shall be in such form as the Secretary or his delegate may by regulations prescribe."

Sec. 6051(d):

"STATEMENTS TO CONSTITUTE INFORMATION RETURNS. — A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary or his delegate shall, when required by such regulations, be filed with the Secretary or his delegate."

Sec. 6161(b):

"AMOUNT DETERMINED AS DEFICIENCY. — Under regulations prescribed by the Secretary or his delegate, the Secretary or his delegate may extend, to the extent provided below, the time for payment of the amount determined as a deficiency:

(1) In the case of a tax imposed by chapter 1 or 12, for a period not to exceed 18 months from the date fixed for payment of the deficiency, and, in exceptional cases, for a further period not to exceed 12 months.

(2) In the case of a tax imposed by chapter 11, for a period not to exceed 4 years from the date otherwise fixed for payment of the deficiency.

An extension under this subsection may be granted only where it is shown to the satisfaction of the Secretary or his delegate that the payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer in the case of a tax imposed by chapter 1, to the estate in the case of a tax imposed by chapter 11, or to the donor in the case of a tax imposed by chapter 12. No extension shall be granted if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax."

Sec. 6201(a) ASSESSMENT AUTHORITY:

"AUTHORITY OF SECRETARY OR DELEGATE. — The Secretary or his delegate is authorized and required to make the inquiries determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN. — The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Sec. 6204(a):

"GENERAL RULE. — The Secretary or his delegate may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

Sec. 6513(b):

"PREPAID INCOME TAX. — For purposes of section 6511 or 6512, any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31. For purposes of section 6511 or 6512, any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to an extension of time for filing such return)."

SEC. 6651(a):

"ADDITION TO THE TAX. — In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

SEC. 6653(a):

"NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES AND REGULATIONS WITH RESPECT TO INCOME OR GIFT TAXES. — If any part of any underpayment (as defined in subsection (c)(1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

SEC. 6653(b):

"FRAUD. — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a)."

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS:

"(a) GENERAL RULE.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is filed by Arold H. Ripperger whose conviction by the U. S. District Court for the District of Maryland of willful failure to file income tax returns for the years 1953 and 1954, under Section 145(a) of the Internal Revenue Code of 1939, and Section 7203 of the Internal Revenue Code of 1954, respectively, was affirmed by the Court of Appeals for the Fourth Circuit in a *per curiam* opinion dated October 21, 1957.

Defendant is 37 years of age, married, and the father of three children. He resides in Baltimore County, Maryland, and practices law in Baltimore City.

On or about November 18th, 1955, defendant called at the office of Intelligence Division of the Baltimore District Director of Internal Revenue as a result of a letter directed to him concerning the filing of income tax returns. At the time of this visit to the Intelligence Division, an interview of defendant under oath, was had and was reduced to writing and filed in the criminal court case as Government's Exhibit No. 1 (App. 41). In this interview, or more logically, in this statement, defendant forthrightly and candidly explained his reasons for not filing his income tax returns for the years involved on time.

Subsequently, defendant prepared schedules of his income for the years involved and submitted same to Special Agent Haspert, which schedules Special Agent Haspert found to be correct (App. 6, 7, 8). On the basis of these schedules, Revenue Agent Wheeler, who worked on the case with Special Agent Haspert, computed *deficiencies* in income tax due by defendant (App. 11). Part of defendant's income tax for each of the years involved had been paid through the withholding of taxes by defendant's employers (App. 11). Income taxes had been withheld by defendant's

employers and Forms W-2 (tax withheld) had been filed with the District Director of Internal Revenue for each year involved under instructions from defendant to his employers to do so (App. 13, and defendant's Exhibit No. 1, App. 47).

Defendant knew that the Forms W-2 went to the District Director's office where he should file his returns and pay his taxes (App. 16). Defendant was of the opinion that thereafter an account was set up in his name in the collector's office as a result of the filing of Forms W-2 (App. 28). Defendant told the agents during the investigation that he was aware of the fact that he had sufficient income in the years involved to require the filing of returns on which there would be some tax liability; but at the time returns and taxes were due he did not have the funds available for the payments. Defendant's law practice was not steady and he told the agents that he was looking to the development thereof to the point where he could clean up all the obligations at once (App. 45, 46). During each of the years involved herein, defendant had a part-time job as church organist and choir director.

Defendant was never under the impression that he was responsible criminally because of his failure to file returns, although during the investigation he was made aware of it by the agents of the Internal Revenue Service (App. 17).

During the course of the investigation of his tax liability by the Intelligence Division, defendant received a letter dated June 4, 1956, from the Chief of the Intelligence Division notifying defendant that the investigation was "nearing completion", and because consideration was being given to the possible recommendation that criminal proceedings be instituted against defendant "it is deemed appropriate *to grant you a conference before final decision is*

made, at which time you may appear with counsel . . ." (Emphasis supplied.) (Def.'s Exh. No. 2-B, App. 50). A definite time for the conference was mentioned in the letter from the Chief of the Intelligence Division, but this date was postponed until the following week by agreement between Special Agent Haspert and defendant (App. 17). Prior to the date which had been set for the conference, Special Agent Haspert notified defendant that they weren't going to have the conference (App. 18).

Thereafter Special Agent Haspert made an affidavit on the basis of which the U. S. Attorney issued a criminal information charging defendant with willful failure to file income tax returns for the years involved. The signficant wording of Special Agent Haspert's affidavit is as follows:

> "As a result of this investigation he (Haspert) is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns . . ." (Record on Appeal, p. 3).

No reasons were cited by Special Agent Haspert for his belief that there was probable cause of defendant's guilt either in his affidavit (Record on Appeal, p. 3), or in his testimony given in Court (App. 5-8), unless the mere failure to file returns is in itself, with nothing more, considered as evidence sufficient to prove guilt of willfulness.

On April 22, 1957, defendant entered a plea of not guilty and was tried before the Judge of the U. S. District Court for the District of Maryland without a jury. A verdict of guilty on both counts of the Criminal Information was rendered by the Judge and defendant was sentenced to three months' imprisonment.

The government's case was based upon the testimony of three agents of the Internal Revenue Service — Special

Agents Carney and Haspert of the Intelligence Division; and Revenue Agent Wheeler. (A fourth witness testified only that he had been unable to locate income tax returns of defendant for the years involved.)

The testimony of these three government agents was so short that their testimony is set forth in full in defendant's brief (App. 1-12). The testimony of the three government agents discloses the following information, and no more: the full cooperation of defendant in giving his statement under oath; his full cooperation in preparing schedules of his income and furnishing the agents therewith; testimony as to the accuracy of said schedules; and testimony as to the computation of defendant's tax deficiency. There is no testimony from the government's agents of any specific act of willfulness, fraudulent conduct, tax evasion, evil intent or bad motive.

Defendant testified that he knew he had disclosed to the District Director of Internal Revenue in Baltimore his taxable status for the years involved by causing the payment of taxes to be made through the withholding method, and by the filing of W-2's and the opening of an account in his name as a result thereof in the Director's office (App. 13, 15, 16, 28). He stated he intended to pay the balance of his taxes (part thereof having been currently paid) and file his returns when he accumulated the money therefor (App. 26). In refraining from filing his returns on time, defendant relied upon two points, as follows: (1) the government's instruction sheet which states that the balance of the tax due "must be paid with your return"; and (2) the fact that he did not have sufficient funds to pay the tax when the returns were due (App. 25, 27, Def's. Exh. 6, Def's. Exh. 4). He did not have any intention of evading any taxes nor deceiving the collector as to the existence or extent of his tax liability (App. 26).

None of the defendant' testimony was disproved by the government; nor did any of the government's agents testify to facts contrary to defendant's testimony.

The prosecution was inaugurated by Special Agent Haspert's affidavit that he had "probable cause" to believe defendant was guilty of willful failure to file his income tax returns, but no facts were testified to by Haspert, nor any other government witness, to support the "probable cause" for such belief of defendant's guilt, other than the mere failure of defendant to file returns for the years involved.

The conclusions of the trial court that defendant "attempted to evade the payment of taxes" is not supported by any affirmative acts of tax evasion by defendant referred to by the court. Instead, the court specifically states that his conclusion is merely an inference (App. 34).

The conclusion of the trial court that defendant's failure to file his returns for the years involved was willful is not supported by a specific finding by the trial court of an evil intent of defendant.

As we will show later in the Argument in this Petition, the Court of Appeals, in adopting the opinion of the trial court, has denied due process of law to defendant and has made other determinations giving rise to special and important reasons for this Court to review this case on writ of certiorari, and which require a reversal of defendant's conviction.

REASONS FOR GRANTING THE WRIT

The Petition should be granted in this case because:

(1) Denial of Due Process of Law.

The defendant was precluded from appearing with counsel at the usual final conference granted to taxpayers dur-

ing the investigations of tax liability conducted by the Intelligence Division of the Internal Revenue Service. This serious deprivation of a recognized right of individuals to appear with counsel at conference or hearings before administrative bodies resulted from the unduly over-zealous, prejudicial, unwarranted and unexplained cancellation by a Special Agent of the Intelligence Division of a conference which had previously been arranged for defendant, and communicated in writing to him, by the Chief of the Intelligence Division. This conference was of extreme importance to defendant because, as was stated in the notice of the conference, a possible recommendation that criminal proceedings be instituted against defendant was being considered by the Intelligence Division. The Chief of the Intelligence Division stated that "it is deemed appropriate to grant (defendant) a conference *before final decision is made* (on the possible recommendation for criminal prosecution), at which time (defendant) could attend with counsel . . ." (Emphasis supplied.) (Def's. Exh. No. 2-B, App. 50). The evil which can be perpetrated by such over-zealous usurpation of authority and disregard of normal and recognized administrative procedures as occurred in this case, is evidenced by events taking place subsequent to the cancellation of the above-mentioned conference. The conference, pursuant to recognized normal administrative procedure in such cases, was to be held before the investigation of defendant's tax liability was completed. Moreover, the conference presumably was for the purpose of giving defendant or his counsel an opportunity to present evidence or arguments and thereby to prevent a recommendation being made by the Intelligence Division for criminal prosecution. However, following the cancellation of the above mentioned conference, the same Special Agent Haspert who cancelled the conference, also made an affi-

davit that "as a result of this investigation he is satisfied that there is probable cause to believe that the said (defendant)" is guilty of willful failure to file his income tax returns. It was on the basis of this affidavit that the U. S. Attorney filed the criminal information against Defendant. And it was on the testimony of the same Special Agent, together with the two other government witnesses, that defendant was prosecuted and convicted.[3]

In view of the anticipated increase in prosecutions for tax violations, according to figures released by the Department of Justice, this court, it is respectfully submitted, should grant a review of this case on writ of certiorari because of the apparent failure of defendant to secure due process of law which failure resulted from an unwarranted and unjustified act of, and a prejudicial usurpation of authority by an agent of the U. S. Treasury Department.

[3] Counsel for defendant has been informed that defendants, in cases such as this one, are normally given a copy of the criminal information when they appear in response to a Bench warrant; and counsel for defendant is given a copy thereof after he has entered his appearance in the case as defendant's attorney. This procedure was followed in this case, but neither the defendant, nor his counsel, were furnished copies of Special Agent Haspert's affidavit. It is believed that this failure to receive a copy of Haspert's affidavit was through inadvertence or oversight in the U. S. Attorney's Office. Neither defendant, nor his counsel, were aware of the existence of such affidavit until defendant's counsel was called to the U. S. Clerk's Office to examine the Record on Appeal immediately prior to its being forwarded to the Court of Appeals by the Clerk. It was on the occasion of his examination of the papers included in the Record on Appeal that defendant's counsel first had knowledge of the existence of Special Agent Haspert's affidavit which was attached to the original criminal information in this case. Because of these facts defendant had no knowledge of grounds on the basis of which the criminal information could be attacked at time of trial.

(2) Question of Federal Law Presented Which Should be Settled by this Court.

There is an important question of Federal law presented in this case which has not been, but should be, settled by this court in that the trial court adopted an hypothetical burden of proof in this case, and in so doing, has embraced a doctrine of law heretofore unknown in prosecutions for income tax violations.

As background of this point, defendant urged upon the trial court the following "Request for Instruction No. 23":

> "The Defendant respectfully prays the Court to instruct itself sitting as a jury that the Congressional intent expressed by Congressional Committees during their consideration of the 1954 Internal Revenue Code expressly states, in effect, that all criminal offenses under the Internal Revenue Laws are, in substance, attempts to evade tax, and the Court, sitting as a jury should consider such Congressional intent in determining whether the Government has met its burden of proof thereunder."

The basis for this Request for Instruction is the "*Report of the Committee on Finance, United States Senate, 83rd Congress, 2d Session, Report No. 1622,*" page 147, wherein Congress stated as follows:

> "In this chapter all criminal offenses are brought together, as are all other offenses. . . .
>
> "In general, uniform penalities are provided by the House bill instead of the varying penalties now provided for *what in substance is the same offense, namely, the attempt to evade tax. . . .*" (Emphasis supplied.)

In other words, it appears that Congress now requires proof by the government amounting to an attempt to evade tax in all prosecutions of criminal offenses under the In-

ternal Revenue Code. If that is so, then the government should be required to prove an "affirmative attempt" as this Court has defined such act in the *Spies* case (*Spies v. U. S.*, 317 U.S. 493, 63 S. Ct. 364 (1943)).

The trial court, however, apparently rejected defendant's "Request for Instruction No. 23" in the following finding:

> "It is not necessary for the government to prove in a case under Section 145(a) or 7203 that the defendant intended or attempted to evade or defeat the payment of taxes *permanently*." (App. 34) (Emphasis supplied.)

In lieu of defendant's requested instruction No. 23, the trial court stated the following hypothetical principal as its measure of the required burden of proof:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes *indefinitely or at all*; but if the government did have such a burden I find that it was met in this case. (Emphasis supplied.)
>
> "That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested" (App. 34).

It appears from the foregoing findings of the trial court, that the court has made a distinction in the law relating to tax evasion which the applicable statutes (Section 145(b), Internal Revenue Code of 1939; Section 7201, 1954 Internal Revenue Code) does not sanction, namely the distinction between "permanent" tax evasion, and tax evasion which is "indefinitely or at all."

The trial court obviously had some distinction in mind by virtue of the fact that it specifically made such distinction.

The court stated that the government did not have the burden of proving in a case under Section 145(a) or 7203 that the defendant intended or attempted to evade or defeat the payment of taxes permanently. Accordingly, the trial court did not find that the government had met such burden of proof. This latter burden, it is respectfully submitted, is the one contemplated by Congress in the application of Section 145(b), Internal Revenue Code of 1939, and Section 7201 of the Internal Revenue Code of 1954.

If the trial court means to say that the government did not prove a willful attempt to evade or defeat any tax, pursuant to the terms of the statute involved, but that the government did prove some lesser or temporary default on the part of defendant from which lesser default the trial court presumed that it was justified in drawing an inference of defendant's intent or attempt to evade tax — and there is some evidence that the court intended such distinction because the court stated that "this is not one of the most serious types of cases" (App. 39); and also stated that "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37) — then the trial court has found that the government proved a crime which does not exist in the statutes and from which proof of such non-existent crime the court presumed that it could draw the conclusion that defendant intended or attempted to evade the payment of taxes from his mere failure to file returns.

That the trial court intended the government in respect of this issue, to be under a burden of proof amounting to something less than actual proof of an intent or attempt to evade the payment of taxes, as that criminal offense is defined by the statute (Sec. 145(b)), and applicable court

decisions, is apparent from the next reason assigned for the granting of this petition wherein it is shown that the trial court refrained from finding an evil motive on the part of defendant in respect of his failure to file income tax returns for the years involved herein.

(3) Court of Appeals Decision in Conflict With Decisions of This Court.

The adoption by the court of appeals of the U. S. District Court's opinion that proof of willfulness on the part of defendant had been met by the government, without a finding by the trial court also that defendant's failure to file his returns was due to an evil motive, or evil intent, is in conflict with the decision of this court in *U. S. v. Murdock*, 290 U.S. 309, 54 S. Ct. 223 (1933); *Morrissette v. U. S.*, 72 S. Ct. 240, 342 U.S. 246.

4. Court of Appeals Decision is in Conflict with other Courts of Appeals.

The adoption by the Court of Appeals of the U. S. District Court's opinion that proof of willfullness on the part of defendant has been met by the government, without a finding by the trial court also that defendant's failure to file his returns was due to an evil motive, or evil intent, or bad purpose, is in conflict with decisions, not only of the Fourth Circuit, but other courts of appeals as well, as follow:

(a) Fourth Circuit — *Yarborough v. United States*, 230 F. 2d 56;

(b) Fifth Circuit — *Hargrove v. United States*, 67 F. 2d 820 (1933);

(c) Ninth Circuit — *Block v. United States*, 221 F. 2d 786 (1955);

(d) Tenth Circuit — *Haskell v. United States*, 241 F. 2d 790.

(5) NECESSITY OF THIS COURT'S POWER OF SUPERVISION

In adopting the opinion of the U. S. District Court, the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower court as to call for an exercise of this court's power of supervision.

There are a number of reasons for this, as follow:

(a) *Evil Intent Not Established*

The trial court found that defendant's failure to file his returns for 1953 and 1954 was willfull. However, a very careful and close examination of the trial court's opinion (App. 33-36) fails to disclose a finding by the trial court of an evil motive which this court held in the *Murdock* case (*supra*) to be an essential element of the offense.

It is significant that the court of appeals did not refer to a finding of evil motive made by the trial court in support of the latter's finding of willfulness.

The court of appeals in its *per curiam* opinion did state that the trial court had found that "an intent to evade taxes had been established."

The trial court, in its opinion, points to no evidence in the case to support the statement that an intent to evade taxes had been "established" other than that "that is a natural inference from the evidence in this case and no other motive or purpose has been suggested" (App. 34).

Moreover, reason No. 2 for granting the writ, above set forth, we respectfully submit, effectively disposes of the finding by the trial court of an intent to evade taxes. Certainly it cannot be maintained that such intent to evade "had been established," as the court of appeals stated was done, by applicable rules of law which this court has heretofor set forth (*Spies* case, *supra*).

(b) *Willfullness Without Evil Motive*

There is substantial evidence contained in the trial court's opinion that the court found willfullness without deeming it necessary to also find an evil motive.

Numerous requests for instructions were presented to the court by defendant in which requests, the question of evil motive was treated fully. Very few of defendant's requests for instructions were granted by the trial court. None of such requests, as to the necessity for proof by the government of an evil motive, was granted. At the conclusion of the trial court's opinion, the court stated that if defendant intends to take an appeal, "I will look over your requests for instructions . . ." (App. 35). However, the record in this case does not disclose specific rulings by the trial court on defendant's Requests for Instructions.

(c) *Defendant was Effectively called upon to Prove Himself Innocent*

The brief testimony of the government's witnesses at defendant's trial reveals a complete absence of any criminal conduct on the part of defendant, or conduct which would disclose evil intent, bad motive, intent to evade taxes, etc.

To make sure that his explanations were fully understood, defendant took the stand in his own behalf.

Virtually all references in the trial court's opinion to matters contained in the testimony adduced during the trial, relate to matters which were injected into the trial, not by the government's witnesses, who, though experienced revenue agents, apparently did not regard such matters of sufficient importance to comment upon in their testimony, but by the trial court when the court took defendant

over for questioning. The trial court, of course, has every right to question the defendant. However, the court's questions disclose undue emphasis, in arriving at its conclusions in this case, on matters such as estimated returns and quarterly payments which were never proved to have been due by defendant, and it is possible that such returns were not due by him. Defendant was not charged with any dereliction in connection therewith. The government's agents did not deem such matters sufficiently important to testify thereto. There is some evidence that defendant's failure to pay taxes of which he was not charged — weighed heavily in the trial court's conclusion of guilt, and may have been the reason for defendant's imprisonment (App. 38).

In connection with the trial court's finding that:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes indefinitely or at all; but if the government did have such a burden, I find that it was met in this case" (App. 34),

a most astounding colloquy between court and defendant's counsel occurred during the direct testimony of defendant.

Defendant was asked by his counsel:

> "Q. Did you have any intention of evading any income taxes for the years 1949 through 1954? A. Not for any year and not for any time" (App. 26).

Before defendant could further pursue this line of defense negating intent to evade taxes, the trial court made the following observation to counsel:

> "(The Court) He is not charged with that. I mean he is not charged under 145(b)" (App. 26).

The court obviously felt at the time it made such statement that such intention to evade tax on the part of defen-

dant had not been proved up to that juncture of the proceedings — which was nearly at the end of the whole case. Clearly, no such evidence or testimony had been given by the government's witnesses. Defendant's counsel therefore abandoned this line of defense and questioned defendant along other lines.

Defendant's counsel was amazed to hear the court's findings quoted above in this sub-paragraph at the conclusion of the testimony in the case.

However, it appears that the court's finding that it is not necessary for the government to prove that defendant intended or attempted to evade or defeat the payment of taxes "permanently" (App. 34) is entirely consistent with the court's observation made to counsel, as above set forth, that the defendant "is not charged with that — I mean he is not charged under 145(b)" (App. 26).

These latter two statements by the trial court, that is, the conclusion that the government does not have to prove an intent, or attempt to evade the payment of taxes permanently, taken in conjunction with the court's observation that defendant was not charged under Section 145(b), reveals, inferentially at least, the trial court's view that in a failure to file prosecution (Section 145(a)), the government does not have to prove an intent or attempt to evade taxes under Section 145(b). And the trial court did not, in fact, make a finding that such intent or attempt to evade taxes had been proved.

Despite the trial court's refusal to find that such intent or attempt to evade taxes had been proved, the court of appeals states in its *per curiam* opinion that the trial court concluded that "an intent to evade taxes had been established".

Defendant testified at length in his own behalf. He vigorously denies harboring any willfullness, evil intent, bad purpose, attempt to evade taxes, etc. Defendant's testimony, and evidence introduced in support thereof, remain unimpeached. Defendant's explanation for failing to file his returns for the years involved was not "that he did not have the money to pay the income taxes due for the years and thought that he was not required to file returns when he did not have the money to pay the taxes due by him," as the court of appeals has summarized his defense. Instead, defendant's explanation is that he was aware that the law required him to file returns because of the amount of income he received, but that his delay in filing them was, in part, based upon his own erroneous construction of such requirement and was not due to any capricious, willfull, evil or fraudulent disregard of such requirement. Defendant's erroneous construction of the requirement for filing his returns was based upon facts proved to be accurate (namely, the lack of funds, etc). Defendant steadfastly testified that he always intended to file his returns and pay up the tax due when he had sufficient funds to do so. None of defendant's testimony was contradicted; none of the testimony of government's witnesses contradicted defendant's testimony. Even the trial court noted that the sincerity of character witnesses who appeared for defendant convinced the court of the regard in which the defendant is held in the community (App. 36).

Despite the failure of the government to produce proof of evil intent, which element is required to support a finding of willfulness; or proof of an intent or attempt to evade taxes; or proof of any other acts of a criminal nature on the part of defendant; and despite defendant's uncontradicted testimony and proof introduced negating evil intent and willfullness on his part; the trial court obviously dis-

regarded all of defendant's explanation made by him in his defense and presumed that it could draw an inference of an intent or attempt to evade the payment of taxes because "no other motive or purpose has been suggested" (App. 34).

It appears therefore that defendant had the burden of proving himself innocent of harboring an intent which the trial court, by inference only, found to exist despite the complete failure of the government's proof as to the existence of such intent. This conclusion of the trial court was reached only by the process of disregarding defendant's explanation and stating that "no other motive or purpose (intent to evade) has been suggested" (App. 34).

ARGUMENT

I.

The Denial of the Right of Defendant to Appear With Counsel at a Conference in the Intelligence Division of Internal Revenue Service, Under the Circumstances Involved Herein, Resulted in a Denial of Due Process of Law.

The Intelligence Division of the Internal Revenue Service operates through its special agents. Their functions primarily are the detection of criminal violations and the determination in the first instance of whether a criminal prosecution should or should not be recommended. As a general rule, most special agents not only seek the facts, but recommend or decline criminal prosecutions.[1] It is apparent, therefore, that an unbridled and over-zealous special agent performs the roles of investigator, prosecutor and judge in connection with alleged fraud investigations conducted by him.

Sometime during the course of the investigation by the Special Agent, the taxpayer, in appropriate cases, is notified

[1] "Taxpayers' Rights in Special Investigations," Louis Bender, 15 Institute on Federal Taxation (N. Y. U.), p. 1280.

in writing by the Chief of the Intelligence Division that the investigation of his tax liability is nearing completion and the Intelligence Division is, for reasons assigned in said notice, considering that recommendation for criminal prosecution be made against the taxpayer. Taxpayer is informed by the Chief of the Intelligence Division that he deems it appropriate to grant taxpayer a conference, before final determination of the matter is made, at which conference taxpayer is entitled to appear with counsel or any other person having knowledge of the facts.

Such procedure, as outlined briefly above, was faithfully followed in the present case. (See Defendant's Exhibit No. 2-B, App. 50.)

At the conference which is usually held as aforesaid, the taxpayer is entitled to learn what the alleged understatements are and the alleged taxes for the years involved (whether he did or did not find this out during the course of the investigation.) At this stage of his case, it is important to taxpayer to know specifically what the special agent is contending regardless of what may have been intimated or may have come to taxpayer's knowledge during the course of the investigation.[3] The conference is of extreme importance to taxpayer in that it provides him with an opportunity, through witnesses and or counsel, to offer evidence and make argument in an effort to convince the Intelligence Division that criminal prosecution of taxpayer is not warranted and should not be made.

Despite the fact that the Chief of the Intelligence Division in the present case wrote to defendant herein, and arranged for the usual final conference, as above described, in response to which defendant advised the Intelligence Division

[3] "Taxpayers' Rights in Special Investigations," Bender, *Supra*, p. 1307.

of his desire to attend. Special Agent Haspert thereafter notified defendant that the final conference would not be held, that it was cancelled. No explanation for such action was given by Haspert to defendant.

About two months later, defendant received a letter from the Regional Counsel of the U. S. Treasury Department advising defendant "that this office is in receipt of reports recommending criminal prosecution against you for various violations of the Internal Revenue laws." (Def's. Exh. No. 2-C, App. 51.)

It is quite obvious, therefore, that such recommendation for criminal prosecution was made by the Intelligence Division *prior to the completion of its investigation* of defendant's income tax liability, and after Special Agent Haspert had successfully *prevented defendant from appearing with counsel* at the conference which had been arranged for defendant by the Chief of the Intelligence Division by simply cancelling such conference.

The point urged in this argument is one of first impression in this court. Therefore, no authorities can be cited.

However, it should be remembered that since the enactment of the income tax laws in 1913 the government has been successfully collecting vast sums of money under our income tax laws. In the present case, however, the deficiencies in income tax due for the two years for which defendant was convicted were $932.00 in 1953 and $862.00 in 1954, a total for the two years of only $1,794.00. It is respectfully submitted that for the purposes of collection of taxes there is no need to curtail any of the constitutional rights of an individual.

In his dissenting opinion in *Shapiro v. United States*, 335 U.S. 1, Mr. Justice Frankfurter stated:

> "While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice."

Because of the flagrant and prejudicial denial of due process of law in this case, for reasons heretofore assigned, as well as for other reasons hereinafter set forth, in Argument II, as well as for other arguments made herein, it is respectfully submitted that the defendant's conviction should be reversed.

II.

Where a Special Agent of the Intelligence Division of Internal Revenue Service, Prior to the Completion of the Division's Investigation of Defendant's Tax Liability Recommends that Defendant be Criminally Prosecuted for Alleged Violations of the Matters Presumably Still Under Investigation by Him, and Thereafter the Same Special Agent Makes an Affidavit that He is Satisfied that There is Probable Cause to Believe Defendant is Guilty of Willful Failure to File Income Tax Returns, and on the Basis of Which Affidavit the U. S. Attorney Files a Criminal Information Against Defendant, as a Result of Which Criminal Information Defendant is Prosecuted and Convicted, Such Procedures Constitute a Denial of Due Process of Law and Require a Reversal of Defendant's Conviction.

The factual background of the argument made here is found in the preliminary statements in the section of this petition headed "Questions Presented," and in the "Statement of the Case," page 16 hereof.

The facts disclose an intolerable disregard of defendant's rights at the hands of agents of such an august arm of our government as the Treasury Department. There is abso-

lutely no justification for the manner in which defendant's rights were so summarily disregarded by the special agent involved herein. If special agents of the Treasury Department are permitted to continue to pursue administrative procedures such as are set forth above, we will no longer have a country ruled by law, but by the whims and arbitrary determinations of men.

Several cases cited below shed some light on the issue involved here.

For example, this court has held that

> "The guarantees of the Federal constitution respecting due process of law and trial by jury are infringed where a revenue officer, without notice, undertakes to assess a penalty for an alleged criminal act, and to enfore payment by seizure and sale of property without opportunity for a hearing of any kind." *Lipke v. Lederer*, 42 S. Ct. 549; 259 U.S. 557, (1922).

In another case, the subject of procedures in administrative agencies was dealt with in the following language of this court:

> "Where Congress entrusts administrative agencies with broad control over activities which in their detail cannot be dealt with directly by the Legislature, Congress must determine the standards of administrative action and in administrative proceedings of a quasi-judicial character in carrying out such entrusted authority, liberty and property of citizens must be protected by full and open hearing.
>
> "The right to a 'full hearing' which is essential to legal validity of administrative regulation under authority entrusted by Congress to an administrative agency, embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v.*

United States (1938) 53 S. Ct. 773; Re-hearing denied, 58 S. Ct. 999; Reversed on other grounds, 59 S. Ct. 795 and 61 S. Ct. 999.

We do not mean to represent to this court that taxpayers, as a matter of right, are entitled to a conference, or hearing, in the office of the Intelligence Division of Internal Revenue Service. To the best of our knowledge they are not so entitled as a matter of right. However, this writer can state that in fifteen years of practice, the largest part of which practice has been the handling of so-called tax fraud cases, he has never known the Intelligence Division, in the course of an investigation being conducted by it, to refrain from issuing to taxpayers in such cases the same type of letter the defendant herein received (Def's. Exh. 2-B). Moreover, text writers on the subject invariably refer to the "final conference" or the "formal questioning" wherein the taxpayer is invited to attend with counsel, if he chooses to do so. The long-standing practice of the Intelligence Division in holding such final conferences has become such a recognized and accepted step in the administrative procedure of that agency as to hold a violation of such procedure, or a deprivation of the right to such final conference, to constitute a denial of due process of law.

In a well conceived article by Warren V. Ludlam, Jr., appearing in the November, 1957 issue of the *American Bar Association Journal*, p. 1069, the subject of certain questionable and deceptive practices on the part of special agents of the Intelligence Unit is treated in an article entitled "Tax Fraud Investigations — A Plea for Constitutional Procedures."

In the head note of said article, it is stated, "The administration of a tax system that collects billions of dollars annually is a complex and perplexing job, and our traditions

require that it be done with full respect for the rights of taxpayers." Mr. Ludlam's article deals with "a small number of Internal Revenue agents who, in their zeal to collect taxes, sometimes resort to practices that, if not illegal, are certainly questionable." The author, in calling attention to the fact that in tax fraud investigations "insidious encroachments" upon basic rights of taxpayers are both easy and likely (and, as he points out, are in fact being practiced by some agents or special agents) petitions for "judicial recognition of deviations, often slight in their incipiency" and for adequate protection against the impairment of fundamental rights of taxpayers.

That it is permissible to now attack the validity of procedures invoked by the special agent during his investigation of defendant, seems to have been heretofore settled in an early case, *Hall v. Johnson*, CCA Col. (1937), 91 F. 2d 363, wherein it was stated:

> "The presumption that record of cases in which accused was convicted truly describes proper performance of various functions of officers involved may be rebutted by a showing, outside of the record, of abuse of due process in failure of judicial or administrative officer in granting to the accused his rights, of which the officer had knowledge. . . ."

Special Agent Haspert undoubtedly had knowledge of the usual practice in the office of the Intelligence Division to grant a conference to taxpayers in cases where a possible recommendation that criminal prosecution be instituted against taxpayer was being considered. Such conference was to be held, in the present case, before final decision was made. It is reasonable to infer, it seems to us, that Special Agent Haspert's report, when submitted to his superiors for action by them, or for the ratification by them of Haspert's action, was known by Haspert to be deficient,

incomplete, and possibly even misleading, in that explanations negating willfullness and other information helpful to defendant which possibly could have been given by defendant, or his counsel, at the conference which Haspert cancelled, were naturally omitted from Haspert's report as a direct result of his own action in cancelling the conference.

Pursuant to procedures of the type practiced by Special Agent Haspert, as evidenced in this case, whereunder his report of the investigation conducted by him apparently contained only those matters which he elected to include in said report since he excluded matters which might have been favorable to taxpayer, which matters taxpayer or his counsel could have produced at a conference in the Intelligence Division, taxpayers' rights would appear to be in serious jeopardy. In view of the possibilities for such arbitrary, discriminating and over-zealous action by an agent, any taxpayer who, for whatever reason, incurred the ill-will of a special agent could expect to meet a fate similar to that experienced in this case by defendant.

It is not sufficient answer to the point we are trying to make here to say that even if any short-cuts were practiced by Haspert during the course of his investigation, they were remedied during the trial of defendant when he took the stand and testified at length in his own behalf. Such is not a sufficient answer to the grievous prejudice under which defendant stood trial as a result of Haspert's over-reaching activities as heretofore enumerated.

The District Court of Maryland is a jurisdiction which is very unfavored by defendants in tax prosecutions. According to figures submitted by the Commissioner of Internal Revenue to the Subcommittee on Internal Revenue Taxation to the Committee on Ways and Means (known as

the Mills Committee), Maryland has the next to lowest incidence of acquittals, dismissals, nolle prosses, etc. in tax prosecutions of any other Federal district in the United States having an appreciable number of such prosecutions — i.e., in excess of 100. The possibilities of securing an acquittal in Maryland are less than 9%. In other jurisdictions, the possibilities of an acquittal, etc., run as high as 66%, such as in the Western District of Arkansas. (See Progress Report of said Subcommittee dated April 22, 1957, Table 16, page 214.)

It is a very serious matter to be brought to trial for a tax offense in any jurisdiction. On the record cited above it is a substantially more serious matter to be brought to trial for such offenses in Maryland than it is in some of the other jurisdictions.

We cite the above facts only to support our contention that arbitrary or discriminatory action of a special agent against a defendant in the course of a tax investigation is not per se fully and adequately remedied by virtue of the fact that the defendant stands trial and has an opportunity to make explanations in his own behalf to the court.

In the case of *McNabb, et al. v. U. S.*, 318 U.S. 332, this court, speaking through Justice Frankfurter stated that:

> "The history of our liberty has largely been the history of observance of procedural safeguards and the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

III.

(a) In Adopting the Opinion of the District Court, the Court of Appeals Rendered a Decision in Conflict With a Decision, or Decisions, of Other Courts of Appeals.

The burden of proof required to prove willfullness in failure to file cases has been well settled since 1933 in which year two decisions on the applicable statute were handed down — one by this court, *U. S. v. Murdock*, 290 U.S. 389 54 S. Ct. 223, decided December 11, 1933; and the other decided by the Court of Appeals for the Fifth Circuit — *Hargrove v. U. S.*, 67 F. 2d 820, on December 7, 1933.

These two opinions are regularly cited in cases involving the question of willfullness.

The Supreme Court in the *Murdock* case gave a number of definitions of the word "willful," but stated that "when used in a criminal statute, it generally means an act done with a bad purpose."

In the *Murdock* case (supra), the defendant was prosecuted and convicted of willful failure to give testimony to Revenue Agents. As to this point, the Supreme Court stated in reversing the conviction that:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

The *Hargrove* case (supra) involved a conviction for failure to file income tax returns. In reversing the lower court, the court of appeals for the Fifth Circuit stated that:

> "A specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it is of the essence."

The very same trial court which decided the present case has heretofore issued instructions in a prior case involving a prosecution for failure to file income tax returns. *Yarborough v. United States*, 230 F. 2d 56.

In the *Yarborough* case the trial court charged the jury in part as follows:

> ". . . The Jury is instructed that this is a criminal proceeding and that the word 'wilful' when used in a criminal statute means an act done with a bad purpose, or one done without justifiable excuse, or one done stubbornly, or obstinately, perversely, with a bad motive.
>
> "I instruct you that the only bad purpose or bad motive, which it is necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed, so that the government would not know the extent of the liability."

Compare the foregoing charge in the *Yarborough* case with the Court's opinion in the present case (App. 33-36). An examination of the opinion in the present case fails to disclose a single reference by the court to the necessity of the government to prove that the failure of defendant to file returns was accompanied by a "bad purpose" or a "bad motive," or any other similar purpose or motive.

The fact of the matter is that the trial court steadfastly refrained from making such a finding even when the issue was called to the court's attention by the U. S. Attorney at the very end of the sentencing. The court then stated:

> "I found that the motive which I stated in my opinion was a sufficient motive to satisfy that requirement, if such a requirement existed, and I stand by that ruling" (App. 41).

The court of appeals affirmed the *Yarborough* case, and affirmed the same trial court in the present case, despite the apparent variance in the trial court's application or interpretation of the law as expressed in its opinion in the present case.

Other courts of appeals have followed the mandate of the *Murdock* case requiring proof of bad faith or evil intent in connection with a finding of willfullness. See: *Hargrove* case, supra, Fifth Circuit; *Block v. U. S.*, 221 F. 2d 286, Ninth Circuit; *Haskell v. U. S.*, 241 F. 2d 790, Tenth Circuit.

That the trial court did not construe the applicable law as requiring proof of an evil motive in a prosecution involving willfullness under a criminal statute, as in this case, is apparent from the following statement contained in the opinion of the trial court wherein the court apparently rejects the necessity of proof of evil motive:

> "I do not think you can pull individual phrases out of an opinion, as some of your requests for instructions do, and pin down the burden on the government in this case *to prove one particular element or one particular way of proving willfullness* and say that they must prove that when they may have proved other alternative avenues of reaching the same conclusion." (App. 35-36) (Emphasis supplied.)

(b) In Adopting the Opinion of the District Court, the Court of Appeals Decided an Important Question of Federal Law Which has not Been, but Should be, Settled by This Court.

In the interests of brevity, petitioner adopts as his argument in support of the contention, set forth in this subparagraph, the contents of section (2) entitled "Question of Federal Law Presented which Should be settled by this Court" under the heading "Reasons For Granting The

(c) In adopting the Opinion of the District Court, the Court of Appeals Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

Petitioner's argument under this sub-paragraph was, to a considerable degree, covered in sub-paragraph (a) above with particular reference to the *Murdock* case discussed therein. An additional case decided by this court involving the issue of willfullness is *Spies v. United States*, 317 U.S. 492, 63 S. Ct. 364. The decision of the court of appeals rendered in the present case is, we respectfully submit, in conflict with this court's decision in the *Murdock* and *Spies* cases (supra).

(d) In Adopting the Opinion of the District Court, the Court of Appeals Sanctioned Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

If this court rejects petitioner's arguments contained in sub-paragraphs (a) and (b) of this Question No. 3, wherein petitioner contends that he has been denied due process of law, then this court should decide, at the very minimum, we respectfully submit, that the evils set forth and complained of in said sub-paragraphs (a) and (b), and sanctioned by the trial court, constitute a sufficient departure from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision.

CONCLUSION

The decision in this case is one of vital importance. The protection of the government's revenues is a matter of interest and concern to all of us. But the protection and safeguarding of individual's rights against arbitrary, capricious and discriminatory action of the government's agents is also a matter of deep concern to all of us, as is the absolute necessity for the application of sound and uniform principals of law in connection with the enforcement of revenue statutes and the collection of the revenues thereunder.

The administrative procedures invoked against defendant in this case do not appear to be warranted or, in fact, authorized.

The principals of law applied by the trial court, and affirmed by the court of appeals, unquestionably constitute a variance or departure from previously existing principals of law heretofore settled by this court and followed by other courts of appeals involving the same subject matter and the facts involved in the present case do not seem to us to justify or necessitate such variance or departure.

It is respectfully prayed that this court grant the Petition for a Writ of Certiorari, as herein prayed.

Respectfully submitted,

R. Carleton Sharretts, Jr.,
1427 Munsey Building,
Baltimore 2, Maryland,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No 7448

Arold H. Ripperger,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued October 15, 1957 Decided October 21, 1957)

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and THOMPSON, District Judge.

R. Carleton Sharretts, Jr., for Appellant, and Leon H. A. Pierson, United States Attorney, for Appellee.

PER CURIAM:

This is an appeal from a conviction and sentence for failure to file income tax returns for the years 1953 and 1954. Appellant is a lawyer who had filed returns for other persons and for himself for certain years prior to the years in question. His defense is that he did not have the money to pay the income taxes due for these years and thought that

he was not required to file returns when he did not have the money to pay the taxes due by him. The case was heard without a jury by the District Judge, who found that the failure of appellant to file the returns was "voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent." He further found that appellant "knew that the returns ought to have been filed and that he deliberately failed to file them so that the government would not know the extent of his income and of his tax liability." With respect to intent to evade the payment of taxes, the judge made the following finding:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes indefinitely or at all; but if the government did have such a burden I find that it was met in this case.
>
> "That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested."

The evidence amply sustained these findings by the judge. Appellant had a gross income of more than $7500 for the year 1953 and of more than $8000 for the year 1954. His tax liability on income not reported as a result of failure to file returns was $932.42 for 1953 and $862.48 for 1954.* He was a lawyer 35 years of age who had been filing tax returns for others and must have known of the duty resting upon those with an income such as his to file tax returns. His explanation that he did not know that the law required the filing of returns when he did not have the money to pay the tax is so unreasonable that the judge was thoroughly justified in not accepting it. As we pointed out in the case of *Yarborough v. United States*, 4 Cir. 230 F. 2d 56, 61, "ignorance of a duty imposed by law may negative wilfulness in failure to perform the duty." Whether such

* A small amount had been withheld from salary which he had earned during these years as organist at a church and had been paid by the employer.

wilfulness was negatived here was a question of fact for the trial judge, who heard the testimony in the case, including that of appellant, and concluded that not only wilfulness in the failure to file the return but also an intent to evade taxes had been established. The judge's statement at the time of conviction and sentence shows that he was applying the principles of law properly applicable in the case. *Yarborough v. United States, supra; Haskel v. United States*, 10 Cir. 241 F. 2d 790; *United States v. Murdock*, 290 U.S. 389; *Spies v. United States*, 317 U.S. 492.

Affirmed.

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JOHN T. FEY, Clerk

No. 679

In the Supreme Court of the United States

OCTOBER TERM, 1957

ARNOLD H. RIPPERGER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 43-45) is reported at 248 F. 2d 944.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1957 (Pet. 43), and on November 20, 1957, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 20, 1957. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the cancellation of a conference scheduled with petitioner by the Intelligence Division of the Internal Revenue Service was a denial of due process of law.

2. Whether the evidence was sufficient to establish that petitioner's failure to file income tax returns was willful.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> (a) *Failure to file returns, submit information, or pay tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> * * * *
>
> (26 U.S.C. 145(a).)

Internal Revenue Code of 1954:

> SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (26 U.S.C. Supp. IV, 7203.)

STATEMENT

On November 9, 1956, petitioner was charged in an information filed in the United States District Court for the District of Maryland, with the willful failure to file his individual income tax returns for the years 1953 and 1954, in violation of Section 145 (a) of the Internal Revenue Code of 1939 and Section 7203 of the Internal Revenue Code of 1954. The case was tried to the court without a jury. Petitioner was found guilty on both counts and was sentenced to three months imprisonment. (R. 35, 39.)[1] The evi-

[1] The appendix to petitioner's brief in the Court of Appeals is designated "R".

dence to support the verdict may be summarized briefly as follows:

Petitioner was admitted to the Maryland bar in 1941 and has been practicing law since 1946 (R. 19, 43, 44). Although petitioner had prepared income tax returns for a number of his clients (R. 19, 46), he ceased filing his own returns after 1948 (R. 45). He filed no returns for the years 1949 through 1954, although he had sufficient income in each of those years to require the filing of a return (R. 6, 20, 24, 45). Moreover, he filed no declarations of estimated tax (R. 32, 45). In the prosecution years petitioner had unreported income (consisting mainly of professional fees) and tax liability as follows (R. 6, 9, 11):

Year	Income	Tax Liability
1953	$6,694.19	$932.92
1954	7,175.31	862.48

Shortly before the trial petitioner (although he still filed no returns) paid his back taxes, exclusive of interest and penalties, totalling some $1,700 (R. 24).

Petitioner testified at the trial that the reason he had not filed returns was that at the time they were due he did not have the money to pay the tax and was under the impression that "when the returns were filed, the taxes had to be paid." (R. 25). Petitioner had previously admitted to the Treasury agents, at the time of his first meeting with them, that he knew he could have filed returns without remittances (R. 5-6).

The trial court found as facts, *inter alia*, the following (R. 33, 34):

> The failure to file the return for both years was voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent.
>
> I find that the defendant knew that the returns ought to have been filed and that he deliberately failed to file them so that the Government would not know the extent of his income and of his tax liability.
>
> I find as a fact that the defendant knew that he had to file a return whether or not he paid the tax, and he knew that he could and should pay the estimated tax quarterly in advance. * * *

ARGUMENT

1. Petitioner's first contention is that he was deprived of due process of law by the cancellation of a conference in the Intelligence Division of the Internal Revenue Service (Pet. 17-19, 29-37). This argument, which was not raised in either court below, is frivolous. Not only is there no requirement of due process that a conference be granted prior to prosecution, but on the facts no such issue is presented here. Near the conclusion of the Treasury agents' investigation, during which petitioner met with them on a number of occasions (R. 5-6), petitioner was invited to a conference in the Intelligence Division Office at Baltimore scheduled for June 11, 1956, at which he could present "any facts or evidence which you wish to have considered * * *" (R. 50-51). Petitioner testified that he

asked for a postponement and the agent "sort of agreed tentatively on June 18th" (R. 17), though petitioner had admitted to the agent that "I wouldn't know what I could do by way of additional evidence because * * * I thought I had said everything that I had to say." (R. 29). The next day the agent advised petitioner that the Baltimore conference was deemed to be unnecessary and that the case would be referred to the Regional Counsel at Philadelphia, where petitioner could have a conference. (R. 18.) Petitioner concedes that he did have such a conference (R. 18, 51-52), and does not venture to suggest what he could have said in Baltimore that might conceivably have altered the decision to forward the case for prosecution.

2. Petitioner's second contention (Pet. 20-29, 38-41) is in essence that the evidence was insufficient to prove that his failure to file returns was willful. He argues that there was no showing of "evil motive" (Pet. 40-41), citing *United States* v. *Murdock*, 290 U. S. 389 and *Spies* v. *United States*, 317 U. S. 492. As already noted, however, the trial court found as a fact that the petitioner had "deliberately failed to file [the returns] so that the Government would not know the extent of his income and of his tax liability", and the evidence amply supported that conclusion. (*Supra*, p. 5.) Not only was the trier of the facts not bound to accept petitioner's explanation that he had thought he could not file the returns without remitting the amount of tax due, but that very testimony was in direct conflict with petitioner's admission to the Treasury agents during the investi-

gation. (R. 5-6.) And there is plainly no merit in the argument (Pet. 20-22, 40) that in a prosecution for willful failure to file a return the Government must prove a willful attempt to evade the tax. *Spies* v. *United States*, 317 U.S. 492, 498-499.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

January, 1958.

Petitioner also lists among his "Questions Presented" (Pet. 1), although he does not argue it, the point that the special agent's signing of the complaint on which the information was predicated was a deprivation of due process because the investigation had not been completed at that time. Not only was this point not raised in either court below but it also rests on a false factual basis. The investigation was complete by August, 1956 (R. 51-52); the agent's complaint was signed at the time the information was filed in November, 1956 (*supra*, p. 3.)